IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVERETTE B. CALDWELL,

Plaintiff,

vs.

SUNBELT COATING, INC. OF OKLAHOMA, an Oklahoma corporation,

Defendant.

Case No. 98-CV-634-BU

ENTERED ON DOCKET

DATE APR 9 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 8th day of April, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| **GERMAN RIOS,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Case No. 98-CV-956 C(J)** |
| | ) | |
| **DAVID H. SANDERS, SR., AND DAVID H. SANDERS, JR.,** | ) | |
| | ) | |
| **Defendants.** | ) | |



**STIPULATION OF DISMISSAL**

The parties hereto, pursuant to **Rule 41** of the Federal Rules of Civil Procedure, appear and stipulate to the dismissal of this **cause**, *with prejudice* to the right of bringing any other future action.

Respectfully submitted,

N. Kay Bridger-Riley, OBA #11121
Bridger-Riley & Associates, P.C.
8909 South Yale Ave., Suite 450
Tulsa, Oklahoma 74137

*Attorney for Plaintiff*

Kimberly M. Steele, OBA #12877
Schroeder & Associates
5100 East Skelly Drive, Suite 950
Tulsa, Oklahoma 74135

*Attorney for Defendants*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| **CHANPEN FARRAR,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 98-CV-0486-EA** |
| | ) | |
| **KENNETH S. APFEL, Commissioner, Social Security Administration,** | ) | |
| | ) | |
| | ) | |
| **Defendant.** | ) | |



**ORDER**

On 31st day of ~~April~~ March, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,032.75 for attorney fees and $150.00 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $2,032.75 and $150.00 in costs for a total award of $2,182.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.



16

IT IS SO ORDERED this 8th day of April, 1999.

Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



VIRGIL LEON SITSLER,

Plaintiff,

vs.

PATRICK BULLARD, Sheriff of Washington County; C.E. STINNETT, Sheriff of Nowata County; and BILL CODY, Deputy Sheriff of Nowata County, Oklahoma,

Defendants.

Case No. 98-CV-641-E (M)



**ORDER**

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983, alleging Fifth, Eighth and Fourteenth Amendment violations. In his original complaint, Plaintiff failed to name each defendant in the caption.[1] As a result, he was ordered to amend his complaint. Plaintiff complied with the Court's order and on September 28, 1998, filed his amended complaint (#4). Subsequently, the Court issued questions to Plaintiff to develop and amplify the factual basis for the complaint. See Watson v. Ault, 525 F.2d 886, 892(5th Cir. 1976); Martinez v. Chavez, 574 F.2d 1043, 1045 (10th Cir. 1978). Plaintiff has now submitted his answers to the Court's questions (Docket #7) as well as Plaintiff's "Questions to This Honorable Court" (#8). In his questions to the Court, Plaintiff inquires as to the receipt and filing of his answers to the Court's questions. Since the docket sheet in this case accurately reflects the inclusion of these answers, the Court finds that Plaintiff's motion concerning "questions to the Court" is moot and

[1]In the text of the original complaint, Plaintiff identified Patrick Bullard, C.E. Stinnett and Bill Cody as defendants. However, C.E. Stinnett and Bill Cody were not named in the caption. See Fed. R. Civ. P. 10(a). Plaintiff was directed to amend his complaint to cure this deficiency.

10

should, therefore, be denied.

Based on a review of Plaintiff's amended complaint and his answers, the Court finds that, pursuant to 28 U.S.C. § 1915(e)(2)(B), certain portions of the complaint should be dismissed and Plaintiff should be afforded an opportunity to amend his claim premised on the Americans with Disabilities Act ("ADA").

## ***BACKGROUND***

Plaintiff alleges that on October 4, 1996, while being transported from the Washington County Jail in Bartlesville, Oklahoma, to the Nowata County Jail in Nowata, Oklahoma, the vehicle in which he was a passenger, driven by Deputy Sheriff Bill Cody, collided with a pickup truck. Plaintiff claims he sustained injury to his neck, back, hip and shoulder as a result of this accident. Plaintiff alleges Defendants, "acting under color of state law," have the responsibility for the operations of the county jail, for maintaining the jail in a safe and sanitary condition, and for protecting the health and safety of the prisoners. Plaintiff claims the Defendants have shown deliberate indifference to his serious medical needs and injuries, "constitut[ing] cruel and unusual punishment" and Defendants have failed to "allow Plaintiff his due process rights"in violation of his 5th, 8th and 14th Amendment rights. He also claims he has been "maliciously discriminated based on the fact that he is incarcerated." He seeks an award of $1,000,000 from each county, an order directing each county to comply with the Americans with Disabilities Act ("ADA") and Rehabilitation Act guidelines, an order directing each county to establish an inmate grievance procedure as well as a court-appointed counsel, and attorney fees and costs.

Copies of medical records and prisoner request forms provided by Plaintiff indicate Plaintiff

was initially examined at the Jane Phillips Nowata Health Center on October 4, 1996. Cervical, hip and lumbar spine x-rays were taken which identified no acute fractures or acute subluxations. Plaintiff was discharged with instructions to take Flexeril 10 mg and Ibuprofen 800 mg twice daily as needed for pain. Plaintiff was then returned to the Washington County Jail. Plaintiff was again seen on October 15, 1996 at the Nowata County Health Center. Records indicate Plaintiff had "good ROM" (range of motion), his neck was supple, and he had no back spasms.

For the period October 25, 1996 to May 8, 1997, Plaintiff submitted numerous *Prisoners Medication and/or Medical Request Forms* to Washington County Jail official complaining of back and neck pain. Plaintiff's grievances are summarized as follows:

| Date Submitted | Date Reply | Reply |
|---|---|---|
| 10/25/96 | | |
| 10/26/96 | 10/28/96 | Cont. 800 mg Ibuprofen and contact Nowata Co ref. back pain; give 1 Benedryl 4 x day for sinus problem. Antifungal creme 4 x day for athlete's foot. Sore throat, gargle with salt water. |
| | 11/03/96 | Continues to have cerv, midback, & lower back pain/tenderness; ... continue Motrin 800 mg and Flexeril 10 mg twice twice daily; extra mattress if available, heat, rest, stretching some as tolerated... |
| 11/--/96 | | |
| 11/15/96 | 11/15/96 | Continued chronic complaint; no acute changes; general back soreness; continue meds as ordered; (inmate requests to be placed in a security cell - no medical indication for it) |
| 11/29/96 | 11/29/96 | Continues to have cervical and mid to lower back pain & stiffness; slowly resolving; continue Flexeril & Ibuprofen, heat, stretching range of motion as tolerated. |

| | | |
|---|---|---|
| 12/06/96 | 12/06/96 | Continued back complaints and athletic's foot; head & chest congestion; stop Sudafed, change to Entex LA twice daily; also Darvocet N100 for back pain |
| 12/12/96 | 12/13/96 | Chest/head congestion, chills, fever; athlete's feet, chronic; continued back pain even taking Darvocet and muscle relaxant; lungs clear; throat clear; neck supple; feet, mild peeling no infection noted; back continues to have muscle soreness & tenderness - however, "inmate gets up & off exam table easily & readily without significant distress..."; will continue medications as directed; observe |
| 12/26/96 | 12/29/96 | Continues to have chronic complaints, no acute changes, has not objectively improved despite use of various medications; continue current medications as prescribed; observe for acute changes |
| 1/--/97 | 1/03/97 | Continued chronic complaint of back pain, congestion, headache, athlete's foot; no acute changes; no acute problems noted or witnessed by jail personnel; "was witnessed vigorously kicking cell door"; sore throat significant complaint recently; will continue current medications; observe |
| 1/10/97 | 1/10/97 | Continued chronic complaints regarding back complaints, headaches, upper respiratory infection; no acute changes; continue current treatment; observe |
| 1/17/97 | 1/20/97 | Continue current medications |
| 1/29/97 | 1/31/97 | Congestion improved on meds; pain to upper back & lower back, continues with tenderness; doesn't feel like meds are helping; hold Darvocet; Flexeril; continue Entex L.A., Ibuprofen; observe |
| 2/07/97 | 2/07/97 | Continues to have chronic complaints regarding back, neck & congestion |

| | | |
|---|---|---|
| | | despite adequate treatment with anti-inflammatory meds, pain med, muscle relaxant, decongestant; no acute changes; may continue meds as ordered |
| 2/12/97 | **2/14/97** | Was ordered for antibiotic (cephalex) this week for URI; continues to have continued chronic back & neck pain; will continue current meds and observe |
| 2/14/97 | | |
| 2/21/97 | **2/21/97** | URI type symptoms; however, he continued to have chronic URI type meds during his entire incarceration; has been using antibiotic regularly without significant change; also continues to have and will continue to have chronic muscoskeletal complaint; continue current meds |
| 2/28/97 | **2/28/97** | Continued chronic complaint; no acute changes; continue usual meds and treatment |
| 3/06/97 | **3/07/97** | Continued chronic complaint; no acute changes noted per jailers; continue usual medication as previously ordered; observe |
| 3/13/97 | | |
| ?? | **3/14/97** | Continued chronic complaint; no acute changes noted per jail personnel; will continue current medications as previously directed; observe |
| 3/21/97 | | |
| 3/27/97 | **3/27/97** | Continues to have same complaints; no acute change; may continue current meds; observe |
| 4/3/97 | **4/04/97** | Continued chronic complaints; no acute changes observed; continue current medications |

| | | |
|---|---|---|
| 4/07/97 | 4/11/97 | Continued chronic complaint; no acute changes noted; continue current meds |
| 4/–/97 | 4/11/97 | Continued chronic complaints; no acute changes noted; continued current meds |
| 4/17/97 | 4/18/97 | Usual weekly complaints; no acute changes noted; may continue usual meds; also RX for athlete's foot; observe |
| 5/01/97 | 5/02/97 | Continued chronic complaints; no acute changes; will continue current meds & treatment |
| 5/08/97 | 5/09/97 | Continued chronic complaints; no acute changes; continue current meds |

In summary, in addition to the initial emergency room treatment, Plaintiff was examined and/or prescribed medication by the county jail medical personnel on at least 24 occasions.

In his complaint, Plaintiff alleges that Defendants were "deliberately indifferent" to his medical condition, failed to meet his "serious medical needs," and failed to provide "some type of rehabilitation." Further, Plaintiff alleges that his neck and back injury entitle him to protection under the ADA as well as the Rehabilitation Act, Section 505. And finally, Plaintiff alleges that when he attempted to appeal the denial of the requested medical treatment, Plaintiff was informed there was no administrative relief procedure. Therefore, Plaintiff alleges his due process rights have been violated by the failure of the county jail to have a grievance procedure.

## ***ANALYSIS***

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443,

1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient, a plaintiff must allege two essential elements: (1) that defendant deprived him of a right secured by the Constitution, and (2) that the alleged deprivation was committed by a person acting under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

28 U.S.C. § 1915A, entitled "Screening," directs the court to review prisoner complaints brought against governmental entities or employees of governmental entities, before docketing or soon thereafter, to identify cognizable claims or dismiss the complaint or any portion of it if it is frivolous or malicious, fails to state a claim on which relief can be granted, or seeks monetary relief from a defendant immune from such relief. See 28. U.S.C. § 1915A. Furthermore, a district court may dismiss an *in forma pauperis* complaint under 28 § 1915(e)(2)(B)(ii) at any time if the court determines that "(A) the allegation of poverty is untrue; or (B) the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."

While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and must be liberally construed, Haines v. Kerner, 404 U.S. 519, 520 (1972), the court should not assume the role of advocate and should dismiss claims which are supported only by vague and conclusory allegations. Hall v. Bellmon, 935 F.2d 1109, 1110 (10th Cir. 1991).

At the time of the incidents giving rise to Plaintiff's claims, he was a pretrial detainee. Therefore, as an initial matter, the Court notes that the Fourteenth Amendment Due Process Clause, and not the Eighth Amendment Cruel and Unusual Punishment Clause, applies in this case. Bell v.

Wolfish, 441 U.S. 520, 535-36 (1979). Accordingly, Plaintiff's Eighth Amendment claims must be dismissed for failure to state a claim and Plaintiff's complaint should be liberally construed, in accordance with his *pro se* status, to allege a violation of his Fourteenth Amendment rights.

**A. Individual and Official Capacities of Defendants**

In the context of civil rights claims against government officials, it is well established that a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates; at a minimum, the plaintiff must allege knowledge or "deliberate indifference" to the subordinates' actions. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Mead v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). In the present case, Defendants will be held individually liable only if, by their own conduct, they deprived the Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986).

After liberally construing Plaintiff's amended complaint, the Court finds that Plaintiff can state no set of facts in support of his claim that Defendants, by their own conduct, caused or participated in any alleged constitutional violations. The Plaintiff alleges that Defendants Ballard and Stinnett have the "statutory responsibility for the operations"of the county jail, for "maintaining the jail in a safe and sanitary condition, and for protecting the health and safety of the prisoners."

(#4 at 5). As stated above, mere supervisory responsibility of the county jail is not sufficient to hold these Defendants individually liable for alleged constitutional deprivations. Rather, the plaintiff must allege that the deprivation "occurred at [his] direction or with [his] knowledge and consent." Volk, 845 F.2d at 1432 (quoting Crowder v. lash, 687 F.2d 996, 1005(7th Cir. 1983)). Even construing Plaintiff's amended complaint liberally, in accordance with his *pro se* status, the Court finds that Plaintiff has failed to set forth adequately the requisite nexus to establish the individual liability of any of the Defendants. Accordingly, Plaintiff's claims against Defendants in their individual capacities must be dismissed.

Claims against a government officer in his official capacity are actually claims against the government entity for which the officer works. Kentucky v. Graham, 473 U.S. 159, 167 (1985). In revisiting this issue, the Supreme Court held that a municipality is liable only when the official policy is the " 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Board of County Comm'rs v. Brown, 520 U.S. 397 (1997). A plaintiff may also show a policy by demonstrating a pattern of conduct or series of acts which reasonably imply the existence of a policy or custom. See Strauss v. Chicago, 760 F.2d 765, 768-69 (7th cir. 1985). Each of Plaintiff's allegations against Defendants in their official capacity will be addressed with these principles in mind.

**1. Lack of Adequate Medical Care Claim**

In order for a prisoner's Fourteenth Amendment[1] claim to rise to the level of a constitutional violation, he must demonstrate that prison officials have shown deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). "Deliberate indifference" is defined as knowing and disregarding an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 827 (1994). To evaluate this claim, the Court must examine whether Plaintiff was denied the "minimal civilized measure of life's necessities." Wilson v. Seiter, 501 U.S. 294 (1991) In Wilson, the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. Id. At 298-99. The Court will analyze the two necessary components under Estelle.

*(a) Objective requirement that the pain or deprivation be sufficiently serious*

As a result of the automobile accident, Plaintiff alleges he received neck, back, hip, and shoulder injuries as well as multiple contusions. He complains that he has pain on a daily basis. Plaintiff states that Defendants responded to his grievances, but complains that Defendants' "continued responses" "shows (sic) that defendant failed to properly investigate plaintiff's serious medical needs or refer to local hospital or physician for examination." (#7, Answers to Court's Questions at 3)

However, there is no evidence that Plaintiff sustained a serious medical injury, resulting in

[1]As previously stated, Plaintiff was a pretrial detainee when his claims arose and the Court liberally construes his Eighth Amendment claim as one brought under the Fourteenth Amendment. Significantly, however, the same level of constitutional violation is required -- "deliberate indifference to serious medical needs." Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985).

substantial harm. The x-rays taken at the emergency room indicate there were no fractures nor subluxations. The examining health care provider stated Plaintiff had "good ROM" (range of motion) and no spasm. Therefore, the Court finds that Plaintiff has failed to meet the first prong of the objective requirement in the Estelle test.

*(b) Subjective requirement that the offending officials act with a sufficiently culpable state of mind*

To satisfy the subjective requirement, Plaintiff must demonstrate that the Defendant had "a sufficiently culpable state of mind." Farmer, 511 U.S. at 834. Thus, a prison official must know of, and disregard, an excessive risk to an inmate's health. Id. at 837. In other words, "the deliberate indifference standard 'describes a state of mind more blameworthy than negligence.'" Id. at 835. To satisfy this culpable-state-of-mind standard, there must be evidence of "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-06.

Disagreement as to the type of medical treatment or the desire to be treated by a specific physician, while perhaps evidence of negligence, does not evidence sufficiently harmful acts or omissions to state a cognizable claim. See Estelle, 429 U.S. at 106. Because "deliberate indifference" requires more than negligence or carelessness, an allegation of questionable medical judgment fails to rise to the level of a constitutional violation. Reading Plaintiff's complaint liberally and construing all allegations in Plaintiff's favor, the Court finds no allegation to show that Defendants, in enforcing county policies, possessed the requisite culpable state of mind necessary to establish a constitutional violation. See Estelle v. Gamble, 429 U.S. at 104. Liberally construing the amended complaint, the Court finds that Plaintiff's allegations amount to "nothing more than

a disagreement with the course of treatment he received while incarcerated." Although Plaintiff wanted some type of "rehabilitation" rather than treatment with medication for pain and muscle spasms, he has provided no evidence that he was refused treatment or that he was denied access to medical personnel capable of treating his problems. The Court finds that even though Plaintiff may have wanted different care or medication, his "disagreement about medical treatment" claim does not rise to the level of constitutional violation cognizable under § 1983. Estelle, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth [Fourteenth] Amendment... Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) ("At most, plaintiff differs with the medical judgment of the prison doctor...Such a difference of opinion does not support a claim of cruel and unusual punishment."); Alston v. Howard, 925 F.Supp. 1034, 1040 (S.D.N.Y. 1996) ("[D]isagreement as to the appropriate course of treatment [does not] create a constitutional claim.") (citation omitted). Even Plaintiff's complaint that he should be treated by a specialist fails to state a constitutional violation. There is no constitutional interest in being treated by a specific physician. Williams v. Keane, 940 F.Supp. 566, 570-72 (S.D.N.Y. 1996) (stating that there is "no constitutional interest in being treated . . . by a specific physician") (citation omitted).

The Court finds that Plaintiff's claim of deliberate indifference to his medical needs should be dismissed for failure to state a claim.

**2. Americans with Disabilities Act ("ADA") and Rehabilitation Act Claims**

The ADA addresses discrimination against persons with disabilities in three contexts. To summarize briefly, Title I bars employment discrimination, see 42 U.S.C. § 12112; Title II bars discrimination in services offered by public entities, see 42 U.S.C. § 12132; and Title III bars discrimination by public accommodations engaged in interstate commerce, such as restaurants, hotels, and transportation carriers. See 42 U.S.C. §§ 12182, 12184; Moore v. Prison Health Services, 1998 WL 698789 (D.Kan. 1998).

It is now clear that Title II of the ADA applies to state prisons and prison services. Id., (quoting Pennsylvania Department of Corrections v. Yeskey, --- U.S. ---, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998)). The Supreme Court held that state prisons "fall squarely" within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." § 12131(1)(B). "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Similarly, section 504 of the Rehabilitation Act[2] provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (1994).

As a preliminary matter, the Court is unable to determine from the record whether or not Defendants receive Federal funds for the operation of the county jails. Without resolving this issue,

[2]Section 504 of the Rehabilitation Act of 1973 (Pub.L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

the rights, procedures, and enforcement remedies under Title II (ADA) are the same as under section 504 (RA) (referred to hereafter as "the Acts.") and upon that basis the Court will analyze Plaintiff's disability claim. See 42 U.S.C. §§ 12134(b), 12201(a); see also Bragdon v. Abbott, 118 S.Ct. 2196 (1998); Siemon v. AT&T Corp., 117 F.3d 1173, 1176 (10th Cir. 1997).

Generally, to establish a violation of the Acts, a plaintiff must show (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. Layton v. Elder, 143 F.3d 469, 472 (8th Cir.1998); see also Doyle v. Fairman, 1997 WL 610332 (N.D.Ill. 1997). The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, polices, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. See 42 U.S.C. § 12131(2). A qualified individual must have a disability, defined under the ADA as a "physical or mental impairment that substantially limits one or more of the major life activities of such individuals." 42 U.S.C. § 12102(2)(A). A major life activity includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Doyle, 1997 WL 610332, n. 5 (quoting Hamm v. Runyon, 51 F.3d 721, 724 (7th Cir. 1995)). The plain meaning of the word "major" requires that the activity be significant, in order to be covered by the ADA. McGuinness v. University of New Mexico School of Medicine, 1998 WL 777070 (10th Cir. Nov. 4, 1998) (unpublished opinion).

When bringing a claim under the ADA, the plaintiff has the initial burden of proving that he is a qualified individual with a disability. In the instant case, Plaintiff claims that his neck and back injuries resulting from the auto accident establish him as a "qualified individual." He further alleges that "unlike an uninjured" individual, he now has difficulty "walking, running, standing, bending over and etc."

As to the discrimination,"Plaintiff claims "the defendants were responsible for insuring that plaintiff would receive proper rehabilitation therapy"and that Defendants have "maliciously discriminated" against him based upon "the fact that [Plaintiff] is incarcerated." (p. 6, #4, Amended Complaint) In describing how Defendants have "maliciously discriminated" against him, Plaintiff states that he was not provided "any required disability items" ---- that he "was placed on a top bunk which he had difficulty in getting down to eat meals;" "plaintiff's cell and area outside cell was not wheelchair accessable [sic] ... he was not provided cruchets [sic] ... defendants failed to allow plaintiff to be examined or assigned a specialist to assist in rehabilitating himself." (#7, Answers to Court's Questions).

A careful review of the amended complaint reveals certain elements necessary to establish entitlement under the Acts are missing. First, there is no indication Plaintiff is a "qualified individual" as defined in 42 U.S.C. § 12131(2). Secondly, having viewed the record in light of Plaintiff's *pro se* status, the Court finds no evidence to support the contention that due to his alleged back-neck-injury-disability, Plaintiff has been excluded from or denied participation in any programs or has been otherwise unable to enjoy benefits offered to others incarcerated in the custody of the county jail. Plaintiff did not allege he was denied meals or excluded from meals but rather that he had difficulty getting down from the top bunk to go to meals. Plaintiff did not allege that he was

denied a place to sleep but rather that he had to sleep on the top bunk and was not provided a "second mattress." Plaintiff alleges his cell and outside area were not wheelchair accessible but there is no evidence Plaintiff needed a wheelchair. Similarly, there is no evidence that a doctor or health care provider directed Defendants to provide crutches for Plaintiff.

Viewing the complaint in the light most favorable to Plaintiff, it appears to the Court that Plaintiff's claim under the ADA and/or the Rehabilitation Act should not be dismissed at this time. Plaintiff should be allowed a second opportunity to amend his complaint to include (1) the specific basis of his allegation that he is a "qualified individual" as defined in 42 U.S.C. § 12131(2); (2) a showing that"defendants ha[ve] unlawfully excluded him from participation in and/or had denied him the benefits of 'services, programs, or activities' of the county jail; and, (3) a description of any injuries suffered as a result of an official policy or custom. Plaintiff must also include a description of the Nowata County Defendants' violations of the ADA, if any.

**3. Lack of Grievance Procedure**

As stated above, for a complaint to be actionable under § 1983, it must allege the violation of some right, privilege, or immunity secured by the Constitution or laws of the United States. See Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled in part, Daniels v. Williams, 474 U.S. 327 (1986). Thus, the first inquiry for a Due Process claim is whether the Constitution or laws of the United States guarantees a right to the grievance procedure demanded by Plaintiff.

Prisoners do not have a constitutionally protected right to a grievance procedure. See, e.g., Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119, 138 (1977) (Burger, J., concurring) ("I do not suggest that the [grievance] procedures are constitutionally mandated."); Adams v. Rice,

40 F.3d 72, 75 (4th Cir.1994) (holding that "the Constitution creates no entitlement to grievance procedures or access to any such procedure voluntarily established by a state") (citing Flick v. Alba, 932 F.2d 728, 729 (8th Cir.1991); Mann v. Adams, 855 F.2d 639, 640 (9th Cir.), *cert. denied*, 488 U.S. 898 (1988)); see also Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir.1989) (no constitutional or state created right to grievance procedure; prison officials may place reasonable limits on prisoner's access to grievance procedure). "A prison grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment." Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir.1993) (citing Azeez v. DeRobertis, 568 F.Supp. 8, 10 (N.D.Ill.1982)).

Plaintiff alleges that Defendants violated his due process right as a pretrial detainee to be free from punishment[3] by failing to "answer any and all grievances sent to them" and by "not investigating]" Plaintiff's complaint for "future redress to this Court or any other court." Liberally construing Plaintiff's allegations, the Court finds Plaintiff's due process claim is insufficient to give rise to a constitutional claim. There is no substantive entitlement to a particular form of process. If Plaintiff has a complaint of constitutional dimensions he can seek redress in federal court, which he has done in this case. He cannot insist, however, that his complaint must be heard through a prison or county grievance system. Flournoy v. Fairman, 897 F.Supp 350 (N.D.Ill. 1995). Thus, Plaintiff's due process claim should be dismissed for failure to state a claim.

[3]The Supreme Court held in Bell v. Wolfish, 441 U.S. 520, 535 (1979), that "under the Due Process Clause, a detainee must not be punished prior to adjudication of guilt or innocence with due process of law."

**B. Request for court-appointed counsel**

Plaintiff has also moved for appointment of counsel in this civil rights matter. (#9). While an indigent plaintiff may be entitled to a court-appointed attorney, the Court shall determine, under the totality of circumstances of the case, if the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985); Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). The Tenth Circuit Court of Appeals reiterated that "'if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts.'" Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838). After reviewing the merits of Plaintiff's case, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court denies Plaintiff's motion for appointment of counsel without prejudice to being reasserted later in these proceedings.

## ***CONCLUSION***

Plaintiff's claims against Defendants in their individual capacities are dismissed for failure to state a claim. Plaintiff's claims against Defendants in their official capacities for lack of medical care and lack of grievance procedure are dismissed for failure to state a claim. Plaintiff's claim against Defendants in their official capacities under the Americans with Disabilities Act and Rehabilitation Act remains pending.

**ACCORDINGLY, IT IS HEREBY ORDERED** that:

(1) All claims against Defendants in their individual capacities are dismissed.

(2) Plaintiff's claims against Defendants in their official capacities for lack of medical care and lack of grievance procedure are dismissed.

(3) Plaintiff's claim against Defendants in their official capacities under the Americans with Disabilities Act and Rehabilitation Act remains pending.

(4) Plaintiff's motion for questions to the Court (#8) is **denied as moot**.

(5) Plaintiff's motion for appointment of counsel (#9) is **denied without prejudice**.

(6) Plaintiff shall submit a second amended complaint within 30 days of the entry of this Order, or by May 12, 1999, in accordance with this Order.

(7) The Clerk shall mail to Plaintiff a blank civil rights complaint, marked with Case Number 98-CV-641-E and the words "second amended." The Clerk shall not issue service of process until further order of the Court.

SO ORDERED THIS 7th day of April, 1999.

JAMES O. ELLISON
United States District Judge

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| UNITED STATES OF AMERICA *ex rel.* WILLIAM I. KOCH and WILLIAM A. PRESLEY, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 91-CV-763-K(J) |
| KOCH INDUSTRIES, INC., *et al.*, | ) | |
| Defendants. | ) | |



**REPORT AND RECOMMENDATION**

473

## TABLE OF CONTENTS

## REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72:

1. Plaintiffs' Motion for Partial Summary Adjudication With Respect to the Statute of Limitations, [Doc. No. 260]; and

2. Defendants' Cross-Motion for Partial Summary Judgment With Respect to the Statute of Limitations, [Doc. No. 280].

For the reasons discussed below, the undersigned recommends that Plaintiffs' motion and Defendants' motion be **GRANTED IN PART and DENIED IN PART**.

The parties' motions for partial summary judgment ask the Court to determine how the False Claims Act's ("FCA") statute of limitations, 31 U.S.C. § 3731(b), is to be applied given the facts of this case. Plaintiffs argue that false claims accruing after May 25, 1979 may be pursued in this action. Defendants argue that only claims accruing after August 3, 1986 may be pursued in this action. For the reasons discussed below, the undersigned finds that only claims accruing after September 30, 1985 may be pursued in this action.

## I. INTRODUCTION

### A. RELEVANT PROCEDURAL HISTORY

The relevant procedural history is outlined in detail in the Tenth Circuit's opinion in United States *ex rel.* The Precision Company v. Koch Industries, Inc., 31 F.3d 1015 (10th Cir. 1994). The undersigned will, therefore, only summarize the facts pertinent to the current statute of limitations dispute.

The Precision Company ("Precision") is a corporation formed by the Plaintiffs, William I. Koch and William A. Presley. Messrs. Koch and Presley are the sole shareholders of Precision. Precision, as a *qui tam* relator, filed an FCA Complaint with this Court on May 25, 1989 in case number 89-CV-437-C.

On November 27, 1990, Judge H. Dale Cook dismissed the 1989 lawsuit filed by Precision. See United States *ex rel.* The Precision Company v. Koch Industries, Inc., 1990 WL 422422 (N.D. Okla. Nov. 27, 1990) (Precision I). Judge Cook held

that the Court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4).[1/] According to Judge Cook, the Court lacked subject matter jurisdiction because Precision could not qualify as an original source under § 3730(e)(4)(B) because Precision had not voluntarily provided all of its information to the government prior to filing a *qui tam* suit. Id.

Precision attacked the dismissal of Precision I on two fronts. First, Precision appealed the dismissal to the Tenth Circuit. Second, Precision sought to cure the jurisdictional defect identified by Judge Cook by providing the government with additional information. Precision then filed a second *qui tam* action with this Court on September 30, 1991 (i.e., 10 months after Judge Cook dismissed Precision I). This second action, Precision II, is the case presently before the Court. The original complaint in this action was virtually identical to the complaint in Precision I.

This case lay dormant while the appeal of Precision I continued. The Tenth Circuit decided Precision I on July 27, 1992, almost 10 months after Precision II (i.e., this lawsuit) was filed. The Tenth Circuit affirmed the dismissal of Precision I for lack of subject matter jurisdiction, but on a ground different than that relied on by Judge Cook. The Tenth Circuit found that a majority of Precision's information had been gathered by its shareholders, Messrs. Koch and Presley, prior to Precision's formation. As to the information gathered by Precision after its formation, the Tenth Circuit found that information to be weak, informal and redundant of the information gathered by Messrs. Koch and Presley. See United States *ex rel.* The Precision Company v. Koch Industries, Inc., 971 F.2d 548, 554 (10th Cir. 1992). Based on these findings, the Tenth Circuit held that Precision could not qualify as an original source under § 3730(e)(4)(B) because it did not have direct and independent knowledge of the information on which the allegations in its *qui tam* complaint were based. Id.

---

[1/] Section 3730(e)(4) provides as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A) &(B).

Within a week of the publishing of the Tenth Circuit's decision affirming the dismissal of Precision I, an amended complaint was filed on August 3, 1992 in Precision II (i.e., this case). The amended complaint added Messrs. Koch and Presley as the *qui tam* plaintiffs and dismissed Precision as the *qui tam* plaintiff. Again, the allegations in the amended complaint were identical to those in the original complaints filed in both Precision I and Precision II.

Defendants moved to dismiss Messrs. Koch and Presley as *qui tam* plaintiffs. Judge Thomas R. Brett granted the motion to dismiss, finding that Messrs. Koch and Presley had not properly amended the original complaint to add themselves as *qui tam* plaintiffs. See Doc. No. 37. Judge Brett's order was appealed to the Tenth Circuit and the Tenth Circuit reversed Judge Brett, finding that Messrs. Koch and Presley had been properly added as *qui tam* plaintiffs to this case. See Doc. No. 41, United States *ex rel.* William I. Koch and William A. Presley v. Koch Industries, Inc., 31 F.2d 1015, 1016 (10th Cir. 1994). Since 1994, this case has preceded with Messrs. Koch and Presley as proper *qui tam* relators.

## B. LEGAL ISSUES PRESENTED

### 1. Relation Back, Fed. R. Civ. P. 15(c) - Which Complaint Stopped the Statute of Limitations From Running as to the Claims Now Being Asserted by Plaintiffs William I. Koch and William A. Presley?

Plaintiffs argue that the amended complaint adding them as *qui tam* plaintiffs to this lawsuit should relate back, under Fed. R. Civ. P. 15(c), to the complaint filed in Precision I (i.e., the complaint filed on May 25, 1989 and dismissed on November 27, 1990). In the alternative, Plaintiffs argue that the amended complaint in this case should relate back to the original complaint filed by Precision in this case on September 30, 1991. Defendants argue that there should be no relation back under Rule 15(c). The Court must, therefore, determine which complaint stopped the running of the statute of limitations as to the claims now being asserted by Plaintiffs William I. Koch and William A. Presley - the original complaint filed in Precision I in 1989, the original complaint filed in this action in 1991 (doc. no. 1), or the first amended complaint filed in this action in 1992 (doc. no. 26).

**2. Statute of Limitations, 31 U.S.C. § 3731(b) – What Limitations Period is Applicable in this Case?**

The FCA contains a specific statute of limitations, which provides as follows:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). The legal dispute presented by the parties' motions is whether § 3731(b)(2) can apply to *qui tam* relators.

If § 3731(b)(2) is applied to ***qui tam*** relators, the parties also disagree as to who "the official of the United States charged with responsibility to act in the circumstances" is given the facts of this case – the Department of Justice, the Senate, the FBI or the Bureau of Land Management. Defendants argue that the relevant official in this case is the Bureau of Land Management. The Court must determine, therefore, which government official's knowledge triggers § 3731(b)(2)'s limitations period if § 3731(b)(2) applies in this case.

## II. RELATION BACK – WHICH COMPLAINT STOPPED THE STATUTE OF LIMITATIONS FROM RUNNING AS TO THE CLAIMS NOW BEING ASSERTED BY PLAINTIFFS WILLIAM I. KOCH AND WILLIAM A. PRESLEY?

The relation back principles of the Federal Rules of Civil Procedure are found in Rule 15, which provides as follows:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c).

The law that provides the statute of limitations applicable to this action is the FCA's statute of limitations at 31 U.S.C. § 3731(b). Section 3731(b) contains no provisions dealing with the relation back of amendments to complaints stating *qui tam* claims. Thus, Rule 15(c)(1) is not applicable to this case.

There are three complaints relevant to the statute of limitations issues raised by the parties: the original complaint filed in Precision I in 1989, the original complaint

filed in this action in 1991 (doc. no. 1) and the first amended complaint filed in this action in 1992 (doc. no. 26). The original complaint in Precision I and the original complaint in this case (i.e., Precision II) are identical. The first amended complaint in this case changed the plaintiff from The Precision Company to its sole shareholders William I. Koch and William A. Presley. The first amended complaint in this case added no new claims against Defendants. Defendants' potential liability under all three complaints is identical. Thus, the claims stated in the original complaint in this case arise out of the same conduct, transactions, or occurrences set forth in the original complaint in Precision I and the claims in the first amended complaint in this case arise out of the same conduct, transactions, or occurrences set forth in the original complaint filed in this case. Consequently, Rule 15(c)(2) poses no barrier to finding relation back in this case.

Rule 15(c) does not expressly deal with the relation back of amendments that change party plaintiffs. Rule 15(c)(3) applies to amendments that change "the party . . . against whom a claim is asserted." Thus, by its own terms, Rule 15(c)(3) only applies to amendments adding or changing defendants. The Advisory Committee's notes to the 1966 amendments to Rule 15 make it clear, however, that even though the relation back of amendments adding or changing plaintiffs is not specifically dealt with in Rule 15, relation back of amendments changing plaintiffs is generally permissible. The Advisory Committee states as follows:

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and **the attitude** taken in revised Rule 15(c) toward change of defendants **extends by analogy** to amendments changing plaintiffs.

Fed. R. Civ. P. 15, Advisory Committee Notes, 28 U.S.C. (1966) (emphasis added).

Defendants read the Advisory Committee's note as requiring an amended pleading adding or changing a plaintiff to comply with all of Rule 15(c)(3)'s requirements in order for the amended pleading to relate back. Rule 15(c)(3) has the following requirements: (1) the amendment must comply with Rule 15(c)(2)'s same "conduct, transaction or occurrence" test, which is not an issue in this case; and (2) within 120 days of the filing of the original complaint, the party to be brought in by the amended complaint must have (A) received sufficient notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by the amendment.

Defendants argue that in this case Plaintiffs cannot establish a "mistake concerning the identity of the proper party." Defendants argue that the decision to bring Precision I and then the original complaint in this case in the name of The Precision Company, rather than in Messrs. Koch and Presley's name, was a conscious and deliberate act, designed to shield Messrs. Koch and Presley from personal liability and make the claim appear more legitimate. According to Defendants, the fact that Messrs. Koch and Presley had to be added as Plaintiffs, due to the Tenth Circuit's ruling in Precision I that Precision could not qualify as an original source, was the result of a conscious and deliberate decision by Plaintiffs, not the result of a mistake concerning the identity of the proper party. The undersigned does not agree with Defendants' analysis of the relation back issue presented by this case.

### A. WHAT STANDARD SHOULD BE USED TO DETERMINE WHETHER AN AMENDMENT ADDING OR CHANGING A PLAINTIFF RELATES BACK UNDER FED. R. CIV. P. 15?

The relation back of amendments is intimately connected with statute of limitations policy. Fed. R. Civ. P. 15, Advisory Committee Notes, 28 U.S.C. (1966). Statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" United States v. Kubrick, 444 U.S. 111, 117 (1979). Statutes of limitation afford plaintiffs what the legislature deems a reasonable time to present their claims, and "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." Id. Thus, at a minimum, a relation back rule must not undermine the policies underlying statutes of limitation in general - protecting defendants from stale claims by ensuring that defendants receive timely notice of a potential claim.

The Advisory Committee's 1966 note does not suggest that the explicit requirements in Rule 15(c)(3) must be applied to amendments that change or add plaintiffs. Rather, the note states that the "attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." The note is referring to an "attitude" that should be applied by analogy, and not to any specific requirements in Rule 15(c)(3) that should be applied by analogy. The "attitude" in Rule 15(c)(3) is to permit amendments to relate back when the amendment would not prejudice a defendant's right to defend claims brought against him. Thus, the Advisory Committee note only suggests that a relation back rule applied to amendments changing or adding plaintiffs should be designed, like Rule 15(c)(3), to ensure that a defendant's ability to defend on the merits is not prejudiced. See Clif J. Shapiro, Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c), 50 Geo. Wash. L. Rev. 671, 673 (1982).

In his article, Mr. Shapiro divides amendments adding plaintiffs into two categories, and applies a different relation back rule to each category. The first category of amendments are those where the new plaintiff asserts the same claim that was being asserted by the original plaintiff (i.e., the substituted plaintiff cases). The second category of amendments are those where the new plaintiff asserts claims different than the claims asserted by the original plaintiff (i.e., the added plaintiff cases). Mr. Shapiro argues that the "substituted plaintiff" category of amendments should always relate back. According to Mr. Shapiro, the "added plaintiff" category of amendments should relate back "only if the new claims arose from the same conduct, transaction, or occurrence the original plaintiff complained of and either the evidence required to defend against the new claims has not deteriorated due to the passage of time or the original [complaint] notified the defendant of a reasonable likelihood that an additional plaintiff would assert the claims." Clif J. Shapiro, Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c), 50 Geo. Wash. L. Rev. 671, 673 (1982). The undersigned finds Mr. Shapiro's analytical model to be an accurate synthesis of the relevant case law and recommends that Mr. Shapiro's analytic model be applied in this case.

The undersigned finds that this case is a substituted plaintiff case, and the cases relied on by Defendants are added plaintiff cases. In the cases relied on by Defendants, the amendments at issue added new plaintiffs who were asserting new claims of their own. See, e.g., Nelson v. County of Allegheny, 60 F.3d 1010, 1014 (3rd Cir. 1995). None of the cases relied on by Defendants involve the situation present here, where the new plaintiff is completely substituted for the original plaintiff and no new claims are added.

Defendants rely primarily on the Third Circuit's decision in Nelson. In Nelson, a group of women, anti-abortion protestors were arrested during a demonstration. Within two years of the arrest, four women filed a class action civil rights case on behalf of all women arrested during the demonstration. The district court refused to certify a class, leaving the four putative class representatives with their individual claims. Approximately three years after the denial of class certification, and after the two year statute of limitations had run, an amended complaint was filed to add as plaintiffs two additional women who had been arrested at the demonstration. The two new plaintiffs argued that the amended complaint adding them as plaintiffs should relate back, under Rule 15(c), to the filing of the original complaint by the four original plaintiffs. Nelson, 60 F.3d at 1011-12.

The district court refused to relate the complaint back, and dismissed the claims of the two new plaintiffs as barred by the statute of limitations. The two plaintiffs who sought to add themselves by amendment appealed the dismissal of their claims. The Third Circuit affirmed the dismissal, finding that the amended complaint adding the two new plaintiffs did not relate back to the original complaint. The Third Circuit

refused to relate the amended complaint back, finding that the two new plaintiffs had failed to demonstrate that the defendants knew or should have known that, but for a mistake, they would have been sued directly by these new plaintiffs. Nelson, 60 F.3d at 1015.

Nelson represents the "added plaintiff" category of plaintiff-changing amendments identified in Mr. Shapiro's article. In Nelson, the plaintiff-changing amendment added two new claims to the lawsuit, and accordingly increased the defendants' potential liability. The two new plaintiffs were not substituting themselves for the original plaintiffs. They were attempting to assert their own individual claims, not the claims of the four original plaintiffs. As Mr. Shapiro argued in his article, when new claims are asserted, defendants are entitled to more protection. The Third Circuit gave the defendants more protection in Nelson by requiring that the new plaintiffs demonstrate that at the time the original complaint was filed, the defendants knew or should have known of a reasonable likelihood that the new plaintiffs would assert claims against defendants.

The present case is distinguishable from Nelson and represents the "substituted plaintiff" category of plaintiff-changing amendments identified in Mr. Shapiro's article. In this case, the first amended complaint added no new claims against Defendants. Defendants' potential liability under the first amended complaint was identical to their potential liability under the original complaint in this case and the original complaint in Precision I. Such an amendment does not trigger a need for the type of additional protection provided in Nelson and identified by Mr. Shapiro for the "added plaintiff" category of plaintiff-changing amendments.[2/]

The undersigned finds that, absent a showing of prejudice to the defendant, an amendment which substitutes one plaintiff or a group of plaintiffs for the original plaintiff or group of plaintiffs, with no corresponding change in the claims asserted against the defendant, will relate back under Rule 15(c), and no "mistake of identity" need be shown. Relation back under such circumstances does no violence to the principles underlying the relevant statute of limitations.

---

[2/] The other cases cited by Defendants are distinguishable on the same basis. They all represent the "added plaintiff" category of plaintiff-changing amendments. That is, in each case the new plaintiff sought to be added by amendment was asserting a new, personal claim. The new plaintiffs were not being substituted for the original plaintiff. See, e.g., Ambraziunas v. Bank of Boulder, 846 F. Supp. 1459, 1467 (D. Colo. 1994).

## B. THE FIRST AMENDED COMPLAINT IN THIS CASE RELATES BACK TO THE ORIGINAL COMPLAINT IN THIS CASE.

In an Order issued on October 6, 1995 dealing with the parties' subject matter jurisdictional arguments, the Court previously determined that the first amended complaint in this case relates back to the original complaint in this case. In its October 6th Order, the Court specifically held that "the amendment adding Mr. Koch and Mr. Presley relates back to the date the original Complaint was filed . . . ." Doc. No. 99, pp. 17-18. Defendants have offered no convincing reason why the Court's prior determination should be disturbed.

The original complaint in this case put Defendants on notice of the FCA claims asserted in that complaint. The first amended complaint changed the plaintiff from The Precision Company to its sole shareholders, William I. Koch and William A. Presley. The first amended complaint added no new claims against Defendants. Because the first amended complaint does not raise any notice concerns, the undersigned finds that the polices underlying statutes of limitation, like the FCA's statute of limitations, would not be undermined if the first amended complaint in this case were related back to the original complaint in this case.[3/]

Defendants have not attempted to demonstrate that permitting the first amended complaint to relate back to the original complaint would in any way prejudice their ability to defend this case. With the original complaint, Defendants were put on notice of the claims being asserted against them. Defendants were able, therefore, to begin preserving any evidence that would be needed to defend the claims. There is, therefore, no danger that because Defendants lacked notice of certain claims, evidence needed for a defense on those claims deteriorated between the time the original complaint in this case was filed and the time the first amended complaint was filed. See, e.g., Allied Int'l v. Int'l Longshoreman's Ass'n, 814 F.2d 32, 37 (1st Cir. 1987) (finding no prejudice from substitution of new plaintiff because "defendants were on notice of the full extent of their liability from the earliest stages of the litigation.").

---

[3/] See 6A Wright & Miller, Federal Practice and Procedure: Civil § 1501 (2d ed. 1990) (recognizing that "[a]s long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense."). See also Staren v. American Nat'l Bank and Trust Co. of Chicago, 529 F.2d 1257, 1262-63 (7th Cir. 1976) (allowing amendment substituting corporation for shareholders to relate back where no additional claims were added by the amendment); and Schurek v. Arthur, 139 B.R. 512, 515 (Bankr. S.D. Ca. 1992) (allowing amendment in an adversary proceeding to relate back where the amendment substituted Chapter 7 trustee as plaintiff for the original creditor without adding any additional claims).

## C. THE FIRST AMENDED COMPLAINT IN THIS CASE DOES NOT RELATE BACK TO THE COMPLAINT FILED IN THE PRECISION I CASE.

### 1. Tenth Circuit Precedent

Plaintiffs argue that under Fed. R. Civ. P. 15(c), they should be permitted to relate the amended complaint in this 1991 case back to the filing of the 1989 complaint in Precision I.[4/] Plaintiffs' argument is, however, foreclosed by Tenth Circuit precedent. Rule 15(c)'s amendment principles only operate within the bounds of a single civil action. Rule 15(c) does not permit a complaint filed in one civil action to relate back to a complaint filed in a separate civil action.

In Benge v. United States, 17 F.3d 1286 (10th Cir. 1994), the plaintiff filed a timely action against the United States pursuant to the Federal Tort Claims Act (Benge I). Benge I was dismissed due to plaintiff's failure to obtain proper service. The plaintiff then filed a second FTCA action which was dismissed as untimely (Benge II). The plaintiff appealed Benge II, arguing that Benge II was timely filed because the complaint in Benge II should be related back to the complaint in Benge I. Citing Rule 15, the Tenth Circuit disagreed, holding that "a separately filed claim, as opposed to an amendment or a supplementary pleading, does not relate back to a previously filed claim." Id. at 1288.

Plaintiffs attempt to distinguish the Tenth Circuit's holding in Benge II by pointing out that the Benge I lawsuit was dismissed for lack of service. Despite the fact that the Tenth Circuit's holding is unqualified, Plaintiffs argue that the Tenth Circuit's true holding in Benge II is that because the defendant did not receive notice in Benge I, it would have violated statute of limitations principles to permit the Benge II complaint to relate back to the Benge I complaint. Plaintiffs argue that the Benge II holding should not apply in this case because, unlike the defendants in Benge I., Defendants in this case received proper notice of Precision I. Plaintiffs' purported distinction of Benge II is, however, not supported by post-Benge II authority.

In Wright v. United States, No. 94-7117, 1995 WL 12025 (10th Cir. Jan. 12, 1995), the plaintiff filed a timely FTCA action against the United States (Wright I). The plaintiff and the defendants then filed a joint stipulation of dismissal without prejudice, and Wright I was dismissed without prejudice. The plaintiff then filed a second action identical to Wright I (Wright II). The defendant filed a motion for summary judgment, arguing that Wright II was untimely. The plaintiff responded by

---

[4/] Plaintiffs' argument is notably inconsistent with the original complaint filed in this action by The Precision Company. In the original complaint, Precision argued for a statute of limitations that ran from the filing of the complaint in this case, and not from the filing of the complaint in Precision I. Doc. No. 1, ¶¶ 47 and 48.

arguing that Wright II was timely filed because the complaint in Wright II related back to the complaint in Wright I. Citing Rule 15 and Benge II, the district court dismissed Wright II, finding that the complaint in Wright II could not relate back to the complaint in Wright I.

The dismissal of Wright II was appealed, and the Tenth Circuit summarily affirmed the district court's reliance on Benge II to dismiss Wright II as untimely. Wright II, 1995 WL 12025, at *2. Thus, the Tenth Circuit applied its Benge II holding despite the fact that in Wright I the defendant obviously had notice of the claims being asserted in Wright I, as did the Defendants in this case. See also, Farlano v. United States, No. 95-4165, 1997 WL 139768, *4 (10th Cir. Mar. 25, 1997). The undersigned finds, therefore, that the Tenth Circuit's holding in Benge II must be applied in this case.

In support of their relation back argument, Plaintiffs rely primarily on Bailey. In Bailey, the plaintiff filed two Title VII employment discrimination cases. When confronted with a statute of limitations challenge in the second case, Plaintiff argued that the second case was timely because it should be related back to the first case pursuant to Rule 15(c). The Seventh Circuit rejected Plaintiff's argument holding that "Rule 15(c), by its own terms, only applies to amended pleadings in the same action as the original, timely pleading." Bailey, 910 F.2d at 412-13.

Plaintiffs focus on footnote 9 in the Seventh Circuit's opinion in Bailey. Plaintiffs argue that the Bailey court's decision is based on the fact that the claims in Mr. Bailey's first Title VII lawsuit would not have put the defendants on notice of the claims raised in the second lawsuit. The undersigned does not agree with Plaintiffs that footnote 9 in the Bailey opinion is a qualification of the court's more general holding made in the text of the opinion. The Seventh Circuit is in agreement with the Eighth and Tenth circuits that Rule 15(c) operates within the context of one civil action and does not operate between separate civil actions. In any event, the holding which Plaintiffs ascribe to the Bailey opinion would be inconsistent with the Tenth Circuit precedent discussed above.

**2. The Language of Fed. R. Civ. P. 15(c).**

Plaintiffs' argument is also not consistent with the plain language of Fed. R. Civ. P. 15(c). The plain language of Rule 15(c) establishes that the rule only applies to the filing of an amendment stating a claim which "arose out of the conduct . . . set forth . . . in the original pleading," and that the amendment can only relate "back to the date of the original pleading . . . ." Fed. R. Civ. P. 15(c) (emphasis added). The first amended complaint filed in this case in 1992 cannot plausibly be construed as an amendment to the already dismissed complaint in Precision I without altering the plain meaning of Rule 15(c). See Morgan Distributing Co., Inc. v. Unidynamic Corporation,

868 F.2d 992, 994 (8th Cir. 1989); Reynolds v. S&D Foods, Ind., No. 91-1442-PFK, 1993 WL 95678, at *2 (D. Kan. Mar. 23, 1993); and Bailey v. Northern Indiana Public Service Co., 910 F.2d 406, 412-13 (7th Cir. 1990).

Plaintiffs also argue that by refusing to relate the complaint in this case back to the complaint filed in Precision I, the Court would not be acting consistent with Rule 15's liberal amendment policy. It is true that Rule 15(a) states that leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). There is, however, no similar language in Rule 15(c). While permission to amend a complaint is to be freely given, there is nothing in Rule 15 to indicate that courts must also freely relate complaints back. As the comments to Rule 15(c) state, the chief policy consideration at stake in relation back decisions is the statute of limitations. Consequently, a liberal approach to relation back decisions would do violence to the expectation-settling and conduct-ordering policies behind statutes of limitation.

### 3. Effect of Prior Dismissal Without Prejudice.

Precision I was dismissed by Judge Cook for lack of subject matter jurisdiction. Precision I, 1990 WL 422422 at *3. The Tenth Circuit affirmed the dismissal for lack of subject matter jurisdiction on a different ground. Precision I, 971 F.2d at 554. A dismissal for lack of subject matter jurisdiction is a dismissal without prejudice (i.e., a dismissal not on the merits). Fed. R. Civ. P. 41(b).

Absent a savings statute[5/] which specifically permits a plaintiff to re-file an action within a specified period of time after a dismissal not on the merits, a dismissal without prejudice leaves the situation the same as if the action dismissed without prejudice had never been filed. Precision I stated a claim under the FCA - a federal claim - and there is no federal savings statute. As a result, Plaintiffs receive no credit or tolling for the time that elapsed during the pendency of Precision I.[6/]

---

[5/] See, e.g., 12 Okla. Stat. § 100.

[6/] See Brown v. Hartshorne Public School Dist. #1, 926 F.2d 959, 961 (10th Cir. 1991) ("It is hornbook law that, as a general rule, a voluntary dismissal without prejudice leaves the parties as though the action had never been brought. . . . In the absence of a statute to the contrary, the limitation period is not tolled during the pendency of the dismissed action."); Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029, 1030-31 (10th Cir. 1994) (same); Robinson v. Willow Glen Academy, 895 F.2d 1168, 1169 (7th Cir.1990); Spannaus v. United States Dept. of Justice, 643 F. Supp. 698, 703 (D.D.C. 1986), aff'd, 824 F.2d 52 (D.C. Cir. 1987) ("the dismissal without prejudice did not affect the running of the statute [of limitations]"); Wilson v. Grumman Ohio Corp., 815 F.2d 26, 27-28 (6th Cir. 1987)(without statute to contrary, party cannot deduct from period of limitations time during which action, later dismissed without prejudice for failure to perfect service, was pending); Stein v. Reynolds Sec., Inc., 667 F.2d 33, 33-34 (11th Cir. 1982)(dismissal of suit without prejudice does not authorize later suit brought outside otherwise binding limitation period); Ford v. Sharp, 758 F.2d 1018, 1023 (5th Cir. 1985); Humphreys v. United States, 272 F.2d 411, 412 (9th (continued...)

Defendants argue that a complaint can never be related back to a complaint over which the court lacked subject matter jurisdiction. The undersigned rejects Defendants' arguments, and instead relies on the authorities cited above. A complaint cannot be related back to a complaint over which the court lacked subject matter jurisdiction, not because the court lacked subject matter jurisdiction, but because the law deems the first suit to have never in fact existed. It would, therefore, be impossible to relate a complaint filed in Precision II back to Precision I which, because it was dismissed without prejudice, is deemed to never have existed.

### D. Conclusion

The undersigned recommends that the First Amended Complaint filed in this case be related back to the original complaint filed in this case, but not to the original complaint filed in the Precision I action. Thus, as to the claims now being asserted by William I. Koch and William A, Presley, the applicable statute of limitations was tolled on September 30, 1991 by the filing of the original complaint in this case.[7/]

---

[6/] (...continued)
Cir. 1959); Parker v. Marcotte, 975 F. Supp. 1266, 1269 (C.D. Cal. 1997); and 8 James Wm. Moore, et al., Moore's Federal Practice § 41.50(7)(b) (3d ed. 1997) ("When the district court elects to dismiss an action without prejudice under Rule 41(b), the dismissal leaves the parties in the same legal position as if no suit had been filed. As a consequence, the statute of limitations is not tolled by the filing of the original suit."); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2367 at 186 (1971).

[7/] Plaintiffs filed a Second Amended Complaint on October 29, 1998. [Doc. No. 414]. The Second Amended Complaint alleged three new specific violations of the FCA: (1) disguising a 2¢/gallon marketing fee as an allowable fractionation fee, (2) improperly deducting $1.65/barrel from the price paid for natural gasoline, and (3) improperly imposing a $2.24/barrel trucking charge on condensate. See Second Amended Complaint, Doc. No. 441, ¶¶ 56(c)-(e). Because the briefing on the parties' cross-motions for summary judgment was completed in September 1998, before the filing of the Second Amended Complaint, none of the parties have addressed whether the Second Amended Complaint relates back to the original complaint filed in this action. The parties do agree, however, that the only additional relation-back issue presented by the Second Amended Complaint, which is not already addressed in the motions directed to the First Amended Complaint, is whether the allegations in ¶¶ 56(c)-(e) arise out of the same transaction or occurrence set forth in the original and first amended complaints. Defendants will file a separate motion to dismiss raising any statute of limitations defenses it has in connection with the allegations in ¶¶ 56(c)-(e) of the Second Amended Complaint.

## III. WHICH LIMITATIONS PERIOD IN 31 U.S.C. § 3731(b) IS APPLICABLE TO THIS CASE?

The FCA contains a specific statute of limitations which states:

> A civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Section 3731(b)(2) has been subject to two different interpretations by the courts that have addressed it. First, some courts hold that § 3731(b)(2)'s tolling provision only applies to an FCA action brought by the government, and it does not apply to *qui tam* relators like Plaintiffs - relators are simply limited to the limitations period in § 3731(b)(1).[8/] Second, some courts apply § 3731(b)(2)'s tolling provision to *qui tam* relators, and they also find that the knowledge that triggers § 3731(b)(2)'s three year limitations period is that of either the *qui tam* relator or government.[9/] Plaintiffs argue for a third interpretation - that §3731(b)(2) applies to *qui tam* relators, but the only knowledge that triggers its three year limitation period is the government's knowledge. The Court must, therefore, determine whether, and how, § 3731(b)(2) will be applied in this case.

---

[8/] See United States *ex rel.* Thistlethwaite v. Dowty Woodville Polymer, Ltd., 6 F. Supp.2d 263 (S.D.N.Y. 1998); United States *ex rel.* El Amin v. George Washington Univ., 26 F. Supp.2d 162 (D.D.C. 1998); and United States *ex rel.* Hyatt v. Northrop Corp., 883 F. Supp. 484 (C.D. Cal. 1995) (Hyatt I), aff'd on different reasoning by, 91 F.3d 1211 (9th Cir. 1996).

[9/] United States *ex rel.* Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir. 1996) (Hyatt II); United States *ex rel.* Saaf v. Lehman Brothers, 123 F.3d 1307 (9th Cir. 1997) (summarily applying the holding in Hyatt II); and United States *ex rel.* Sanders v. East Alabama Healthcare Authority, 953 F. Supp. 1404 (M.D. Ala. 1996).

### A. LANGUAGE USED IN § 3731(b) - THE FCA'S STATUTE OF LIMITATIONS

Courts finding that § 3731(b)(2) does not apply to *qui tam* relators and court's finding that § 3731(b)(2) does apply to *qui tam* relators both rely on the "plain language" of § 3731(b)(2). Those courts applying § 3731(b)(2) to *qui tam* relators rely on the first sentence of § 3731, which provides as follows: "A civil action under section 3730 may not be brought [more than the number of years stated in § 3731(a) or (b)]." Section 3730 is that portion of the FCA which defines in subsection (a) when the Attorney General may bring an FCA action on behalf of the United States, and in subsection (b) when private *qui tam* relators may bring an FCA action on behalf of the United States. Because the first sentence of § 3731 refers without any qualification to civil actions under § 3730, and because § 3730 refers to FCA actions brought by both the government and private relators, some courts find that both of § 3731's subsections, including subsection (b)(2), must be applicable to *qui tam* relators.

Those courts refusing to apply § 3731(b)(2) to *qui tam* relators rely on the specific language of subsection (b)(2), which provides as follows: An FCA action may not be brought "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances . . . ." Section 3731(b)(2) refers to an "official of the United States," and *qui tam* relators cannot plausibly be viewed as officials of the United States.[10/] Relators are also not "charged with responsibility to act." Rather, they act out of their own personal motivation. Thus, courts relying on subsection (b)(2)'s language find that subsection (b)(2) refers only to the government, and nothing in subsection (b)(2)'s language suggests that it is intended to apply to *qui tam* relators.

The language of § 3731 is not a model of clarity. Section § 3731's "plain language" can be construed in favor or against applying § 3731(b)(2) to *qui tam* relators. The undersigned finds, therefore, that the language of § 3731 is inconclusive.

---

[10/] The constitutionality of the FCA's *qui tam* provisions has been challenged on many fronts by FCA defendants. One line of attack has been that the FCA's *qui tam* provisions violate the Appointments Clause. See U.S. Const. Art. II, Sec. 2, cl. 2. The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Id. (emphasis added). Courts have rejected appointments clause challenges, holding that *qui tam* relators are not officers of the United States. See, e.g., United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 757-58 (9th Cir. 1993); United States *ex rel.* Taxpayers Against Fraud v. General Electric Co., 41 F.3d 1032, 1041-42 (6th Cir. 1994); and United States *ex rel.* Colunga v. Hercules, Inc., No. 89-CV-954 B, 1998 WL 310481, at *2-5 (D. Ut. Mar. 6, 1998).

### B. LEGISLATIVE HISTORY OF § 3731(b)(2)

The Senate Report drafted in support of the 1986 amendments to the FCA, which added subsection (b)(2) to § 3731, states as follows:

> [T]he subcommittee added a modification of the statute of limitations to permit the Government to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when the Government learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure the Government's rights are not lost through a wrongdoer's successful deception.

S. Rep. No. 345, 99th Cong., 2d Sess., 15 (July 28, 1986), reprinted in 1986 U.S.C.C.A.N. 5266 (emphasis added).

> Subsection (b) of section 3731 of title 31, as amended by section 3 of the bill, would include an explicit tolling provision on the statute of limitations under the False Claims Act. The statute of limitations does not begin to run until the material facts are known by an official within the Department of Justice with the authority to act in the circumstances.

Id. at 30 (emphasis added).

The House Report drafted in support of the 1986 amendments to the FCA, which added subsection (b)(2) to § 3731 states as follows:

> [The amendment] expands the statute of limitations in the False Claims Act. Under current law, the statute of limitations is to be not more than six years after the date of the occurrence of the violation. [The amendment] provides that the statute of limitations shall be not more than six years (as provided by current law), nor more than three years after the date when the material facts of the violation are known or should have been known by the official of the United States with responsibility to act, but no action may be brought more than 10 years after the occurrence of the violation.

> It was brought to the attention of the Committee that fraud is often difficult to detect and that the statute of limitations should not preclude **the Government** from bringing a cause of action under this Act if they were not aware of the fraud. The Committee agreed that this was unfair and so expanded the statute of limitations. However, the Committee did not intend to allow **the Government** to bring fraud actions *ad infintum* [sic], and therefore imposed the strict 10 year limit on False Claims Act cases.

H. Rep. No. 660, 99th Cong., 2d Sess., 25 (June 26, 1986) (emphasis added).

Defendants argue that the legislative history of § 3731(b)(2) establishes that it was only intended to apply to FCA actions being pursued by the government. As with the language actually used by Congress in § 3731(b)(2), the undersigned finds the legislative history from both houses of Congress is also inconclusive.

The plain language of the legislative history certainly suggests that § 3731(b)(2) is only to be applied to FCA actions brought by the government. However, there are many instances in the legislative history of the 1986 amendments to the FCA, where both the Senate and the House of Representatives use the word "Government" as a shorthand to refer to both the United States and a private *qui tam* relator. For example, the House Report discusses the amendment to § 3729 which recognized the validity of reverse false claims. H. Rep. 99-660, at 20. The Report states as follows: "Another amendment to the current law . . . allows the Government to prosecute a false claim which has been filed for the purpose of reducing the amount the claimant owes to the Government." Id. No one can seriously believe that by using the phrase "allows the Government" Congress intended that only the Government, and not a *qui tam* relator, can prosecute a reverse false claim. As it did throughout the legislative history to the 1986 amendments, Congress simply used the word "Government" as a shorthand reference to mean the Government and/or a private relator.

### C. PLAINTIFFS' CANNOT BENEFIT FROM § 3731(b)(2)'S EXTENDED LIMITATIONS PERIOD UNDER EITHER OF THE ONLY TWO PLAUSIBLE INTERPRETATIONS OF § 3731.

The undersigned finds that the Court need not decide whether § 3731 does or does not apply to *qui tam* relators. The undersigned finds that either (1) § 3731(b)(2) does not apply to *qui tam* relators, or (2) § 3731(b)(2) applies to *qui tam* relators, but the relator's, as well as the government's, knowledge triggers § 3731(b)(2)'s three-year limitations period, and Plaintiffs had the relevant knowledge more than three years before this action was filed. Under either holding, Plaintiffs cannot benefit from § 3731(b)(2)' extended statute of limitations, and must rely only on § 3731(b)(1)'s

general six-year limitations period. The undersigned finds no support for Plaintiffs' argument that if § 3731(b)(2) applies to *qui tam* relators, only the government's, and not the relator's knowledge, triggers § 3731(b)(2)'s three-year limitations period.

### 1. If § 3731(b)(2) Applies to Relators, the Relators' Knowledge is Sufficient to Trigger § 3731(b)(2)'s Three-Year Limitations Period.

If § 3731(b)(2) is to be applied to *qui tam* relators, it must be applied in a manner consistent with the purposes of the FCA. Despite its lack of clarity on other issues, there is at least one point on which the legislative history of the 1986 amendments to the FCA is clear. The main purpose behind the *qui tam* provisions of the FCA is to encourage private individuals, who are aware of fraud being perpetrated against the Government, to bring their information forward. S. Rep, 99-345, at 2 and 30; H. Rep. 99-660, at 23. Thus, nothing in the FCA should be construed in such a way as to create any incentive for *qui tam* relators to hold on to information evidencing fraud rather than promptly disclosing that information to the government.

The undersigned finds that if § 3731(b)(2) is applied to *qui tam* relators, without any consideration of the relator's knowledge, § 3731(b)(2) would create at least some incentive for relators to hold on to information evidencing fraud rather than disclosing that information to the government. If a relator's knowledge is not itself sufficient to trigger § 3731(b)(2)'s three-year limitations period, relators would likely hold on to their information longer than they otherwise would so that the three-year limitations period in § 3731(b)(2) would not be triggered by their own disclosure to the government. For example, hoping to increase his recovery, a relator who knows about FCA violations soon after they begin occurring, could wait just under 10 years before notifying the government, and then still file an FCA claim as a relator.[11/] Such a result could not have been intended by Congress. It is also unlikely that Congress would have intended to permit relators to control the running of § 3731(b)(2)'s limitations period in this manner. See Hyatt, 91 F.3d at 1218;[12/] Saaf, 123 F.3d at 1308; El

---

[11/] Such a delay would be detrimental to the government, who has an interest in stopping fraud being committed against it as soon as possible. The relator's delay may also prevent the government from criminally prosecuting the defendant. See, e.g., 18 U.S.C. §§ 287 and 3282, which impose a five year statute of limitations for criminal prosecution of persons who deliberately submit false claims to the armed forces. The incentive to delay created by Plaintiffs' interpretation of § 3731(b)(1) could also expose the relator to prosecution for misprision of a felony. See 18 U.S.C. § 4 (making criminal the failure to make known to the government as soon as possible that a felony has been committed).

[12/] Plaintiffs argue that the Ninth Circuit's opinion in this case was vacated by the Supreme Court. Doc. No. 304, p. 14. Plaintiffs are wrong. The Supreme Court vacated another decision in a different action between the same parties. See United States *ex rel.* Hyatt v. Northrop Corp., 80 F.3d 1425 (1996), vacated by 521 U.S. 1101 (1997) (dealing with the retroactivity of amendments to the FCA's jurisdictional (continued...)

Amin, 26 F. Supp. 2d at 173; Sanders, 953 F. Supp. at 1412-13; and Hyatt, 883 F. Supp. at 487-88.

Plaintiffs argue that the possibility that § 3731(b)(2) might cause a relator to hold on to information rather than disclose it to the government is a "theoretical," but not a "practical" concern. Plaintiffs argue that the danger of delay created by § 3731(b)(2) is offset by the fact that a relator who waits too long to disclose his information to the government and file suit might find himself (1) barred by the FCA's first to file rule, should another relator file an action during the delay; or (2) having to clear the FCA's "original source" jurisdictional hurdle because the information possessed by the relator has been publicly disclosed during the delay. See 31 U.S.C. §§ 3730(b)(5) and 3730(e)(4)(B).

Plaintiffs may be correct that a relator may not wait the full ten years to disclose his information to the government, but the undersigned is convinced that Plaintiffs' interpretation of § 3731(b)(2) would create enough of an incentive that a significant number of relators would wait longer than they otherwise would to make disclosure to the government. Plaintiffs' argument would also be more convincing if there was anything in either the language of the FCA or its legislative history which demonstrated that Congress engaged in the type of weighing of risks that Plaintiffs' argument suggests. There is, however, nothing to suggest that Congress weighed the danger of delay caused by Plaintiffs' interpretation of § 3731(b)(2) and found the risk of delay acceptable in light of the first to file and original source provisions in the FCA. Without such an analysis, which must be conducted by Congress, and not this Court, the undersigned cannot, consistent with the purposes expressly stated by Congress in the FCA's legislative history (i.e., prompt disclosure to the government), find that § 3731(b)(2) should be interpreted in any way that would create any incentive for delaying disclosure to the government.

If § 3731(b)(2) applies to *qui tam* relators, it applies in part because Congress, as demonstrated in the legislative history, must have meant for the word government to be a short hand reference referring to the government and *qui tam* relators. Thus, the use of the word government in § 3731(b)(2) must be understood as a reference to *qui tam* relators as well. It is, therefore, not unreasonable to conclude that if Plaintiffs are able to benefit from § 3731(b)(2)'s extended limitations period, Plaintiffs must also be bound by the conditions in § 3731(b)(2). The undersigned finds, therefore, that if § 3731(b)(2) is to be applied to *qui tam* relators, either the relator's or the government's knowledge may trigger § 3731(b)(2)'s three-year statute of limitations.

---

12/ (...continued)
provisions).

Plaintiffs argue that by finding that the relator's knowledge is relevant, a relator could cause the government to lose its right to litigate an FCA claim altogether. Plaintiffs advance the following scenario: (1) A relator obtains facts material to an FCA claim, (2) the government is unaware of these facts, (3) the relator waits more than three years after obtaining the facts to file an FCA claim, and (4) the FCA claim is then dismissed as time barred. Plaintiffs believe that under this scenario, the government will have been prejudiced by the relator's delay because the government will have lost the right to bring an FCA claim on the same facts. Presumably, Plaintiffs believe that this result could not have been intended by Congress.

If in Plaintiffs' scenario, the government, after its statutorily-provided review period,[13/] determined to let the relator proceed on its behalf, as the government did in this case, then the government should, for all the reasons discussed above, be bound by the relators' knowledge as well as its own knowledge for purposes of § 3731(b)(2). What is not clear, however, is whether the government would be bound by the relator's knowledge if it chose to take over the case and prosecute the FCA claim on its own. See 31 U.S.C. § 3730(b)(2)-(4). The FCA specifically states that "[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." Id. at § 3730(c)(1). This section suggests that in an action being prosecuted by the government, the government would not be bound by the relator's knowledge for purposes of § 3731(b)(2). The government could, therefore, theoretically protect itself from the prejudice identified in Plaintiffs' scenario by taking over the prosecution of an FCA claim brought by a relator who delayed disclosing information to the government. Thus, the real issue raised by Plaintiffs' scenario, which has yet to be squarely addressed by the courts, is to what degree can a relator's actions or inaction, prior to the time the government agrees to let the relator proceed with prosecution of an FCA claim, prejudice the government. The Court need not, however, resolve all potential scenarios, especially when the scenario is based on a factual situation not present in this case.

Plaintiffs also argue that it is unfair to use the relator's knowledge as a trigger for § 3731(b)(2) because private individuals often do not have the same investigative resources as the government. Plaintiffs' argument is based on a faulty premise. Congress' underlying reason for authorizing *qui tam* suits was its finding, reached after extensive hearings, that private individuals should be recruited to help the government combat fraud because the government lacked sufficient resources to investigate and prosecute the fraud committed against the government every year. Thus, if a private

---

[13/] To file an FCA claim, a relator must first file his complaint under seal and serve a copy only on the government. The government then has 60 days to decide whether to take over the case itself or to permit the *qui tam* relator to prosecute the case on behalf of the government. See 31 U.S.C. § 3730(b)(2) and (3).

individual lacks sufficient resources to investigate and fully develop an FCA claim, that person should not be serving as a *qui tam* relator in the first place, because he cannot provide the type of assistance Congress expected from *qui tam* relators who will ultimately obtain a share of the government's recovery. In fact, the undersigned is hard-pressed to understand how a private party could satisfy Fed. R. Civ. P. 11 and file a *qui tam* complaint establishing him as a relator if he in fact lacked sufficient resources to investigate the FCA claim.

### *a. Plaintiffs' Cases*

Plaintiffs rely on Colunga, Kreindler and Stevens[14/] as support for their argument that only the government's, and not the relator's knowledge, can trigger § 3731(b)(2)'s three-year statute of limitations. For the reasons discussed below, the undersigned finds none of these cases persuasive.

In Kreindler, the court applied § 3731(b)(2) by looking at the level of the government's knowledge, without discussing the level of the relator's knowledge. The court assumed, without discussing, that the government's knowledge was the relevant knowledge for purpose of § 3731(b)(2). The reasons for this are clear from a review of the facts in that case. The relator was a law firm that had previously represented a plaintiff in a wrongful death case, where the plaintiff's husband had been killed in an army helicopter crash. During the wrongful death litigation, which was pending from 1982 to 1987, the law firm learned facts suggesting that the manufacturer who sold the helicopter to the army had defrauded the army. The law firm then filed an FCA action against the manufacturer. The FCA case was dismissed as untimely because the court found that the government had knowledge of the facts underlying the FCA claim since 1979. Because the case was barred by the government's prior knowledge, there was no need for the court to discuss the relevance of the relator's knowledge. Kreindler is, therefore, inapposite. Kreindler, 777 F. Supp. at 197, and 204-205.

Stevens does not address the issue presented by the parties' motions at all. The relator argued that his claim was timely under § 3731(b)(2), but there was no discussion of whether the claim was timely because of the government's lack of knowledge or the relator's lack of knowledge or both. In any event, the court denied defendant's motion for summary judgment on other grounds. The court denied summary judgment because the defendants had not carried their summary judgment burden, and had not addressed several relevant statute of limitations issues. Stevens, 1996 U.S. Dist. LEXIS 22109, at *46-48. Stevens is, therefore, also inapposite.

---

[14/] See United States *ex rel.* Colunga v. Hercules, No. 89-CV-954, 1998 WL 310481 (D. Ut. Mar. 6, 1998); United States *ex rel.* Kreindler & Kreindler v. United Technologies Corp., 777 F. Supp. 195 (N.D.N.Y. 1991); and United States *re rel.* Stevens v. McGinnins, Inc., No. C-1-93-442, 1996 U.S. Dist. LEXIS 22109 (S.D. Ohio Feb. 16, 1996).

Colunga is the only case that seems to squarely support Plaintiffs' position that in a *qui tam* case, the government's, and not the relator's, knowledge is relevant for purposes of § 3731(b)(2). In Colunga, the court relied on (1) the plain language of the statute, without discussing the first sentence of § 3731; (2) the legislative history, without discussing that history's use of the word government in other contexts; and (3) the same type of the scenario presented by Plaintiffs that was discussed above. Colunga, 1998 WL 310481, at *3-5. As discussed above, the undersigned finds that each of the reasons offered by the court in Colunga for its holding are either inapposite (i.e., supportive of either position) or contrary to Congress' intent to use the FCA's *qui tam* provisions to promote prompt disclosure of information of fraud to the government.

***b. Plaintiffs' Knowledge***

The undersigned has found that if § 3731(b)(2) is applicable to *qui tam* actions, either the relator's or the government's knowledge will trigger § 3731(b)(2)'s three-year statute of limitations. The Court must, therefore, decide if Plaintiffs knew or reasonably should have known of "facts material to [this] action" more than three years prior to the filing of this action on September 30, 1991. That is, did Plaintiffs know or should they have known of "facts material to [this] action" before September 31, 1988?

The undersigned finds that to trigger § 3731(b)(2)'s three-year limitations period, it is not necessary for Plaintiffs to have had knowledge of all details concerning the claims alleged in this lawsuit. Rather, the limitations period in § 3731(b)(2) began to run once the facts making up the "very essence of the right of action" were reasonably knowable to Plaintiffs. United States v. Kass, 740 F.2d 1493, 1497 (11th Cir. 1984), cited with approval by, Phillips Petroleum Co. v. Lujan, 4 F.3d 858, 862 (10th Cir. 1993);[15/] United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 992 F. Supp. 1097, 1107 (D. Minn. 1998). In this case, the relevant facts would be those that informed Plaintiffs that Defendants were under-reporting the amount of oil and gas

---

[15/] Both of these cases were actually interpreting language in 28 U.S.C. § 2416(c). In the absence of a more specific statute of limitations, like 31 U.S.C. § 3731(b), 28 U.S.C. §§ 2415 and 2416 contain general statutes of limitations for claims brought by the government. Section 2415 sets general limitations periods for various types of actions. For purposes of calculating the limitations periods set out in § 2415, § 2416 lists certain time periods which are to be excluded. Section 2416 specifically excludes any period of time during which "facts material to the right of action are not known and could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c). The language in 28 U.S.C. § 2416(c) is sufficiently similar to the language in 31 U.S.C. § 3731(b)(2), that the undersigned finds that cases interpreting § 2416(c) provide persuasive guidance in determining how to interpret § 3731(b)(2). See United States *ex rel.* Kreindler & Kreindler v. United Technologies Corp., 777 F. Supp. 195 (N.D.N.Y. 1991), aff'd, 985 F.2d 1148 (2nd Cir. 1993) (an FCA case where the court used § 2416(c) to help interpret § 3731(b)(2)).

they were purchasing. The precise amount of that under-reporting need not have been known because a party should not be permitted to delay filing suit until he knows the exact dollar amount of his damages. United States v. Gavilan Joint Community College District, 849 F.2d 1246, 1249 (9th Cir. 1988).

Based on the summary judgment record before the Court, the undersigned finds the following facts are undisputed:

1. William I. Koch was an executive in Defendants' organization from 1963 to 1983, and he owned approximately 20% of Defendants' stock. From 1973 to 1981, Mr. Koch was a member of Defendants' board of directors and he regularly attended board meetings.

2. Between 1981 and 1984, William I. Koch was told by current and ex-employees that Defendants' were engaging in fraudulent measurement practices, which caused Defendants' to consistently come out long (i.e., with more oil than had been paid for). During this period Mr. Koch spoke with Paul Vickery (an ex-product trader for Defendants), Robert Vickery (repeating what he had heard from an ex-gauger of Defendants he had hired), Jack Thornton, Roger Williams, Tom Gargas and Gail Laird (an ex-executive of Defendants).

3. In 1983, Mr. Koch began an investigation of Defendants, but the investigation was stopped shortly after it began.

4. Also between 1981 and 1983, Mr. Koch came to believe that:

   a. Defendants had established a school to train its gaugers to "cheat" producers by using a gauging method and by calibrating gauging tools to insure overages (i.e., the taking of more oil than was paid for) for Defendants;

   b. Defendants did in fact have significant overages (from ½ to 6%) due to the gauging practices of Defendants' gaugers; and

   c. Defendants had developed a policy to use these overages as a profit center.

5. In 1987, Mr. Koch spoke again with Roger Williams, an ex-employee of Defendants. Mr. Williams told Mr. Koch about Defendants' "aggressive" measurement practices. These practices included unjustified adjustments being made to bs&w measurements and temperature measurements by Defendants' gaugers. Mr. Williams was personally involved in these practices, which Mr. Koch believed were "highly illegal."

   a. Based on his discussions with Mr. Williams, Mr. Koch made plans to try and develop a device that could be marketed to producers to help them detect fraudulent measurement practices on their leases. The proposed product never got past the development stage and was eventually abandoned by Mr. Koch.

6. Beginning some time in late 1987 and early 1988, Mr. Koch began a full-scale investigation of Defendants' measurement practices.

7. On February 12, 1988, Mr. Koch filed an amendment to his complaint in Oxbow Energy Inc. v. Koch Industries, Inc., No. 87-2436-S (D. Kan. 1987). See Doc. No. 281, App. 5. The amendment added two RICO counts to the complaint. Mr. Koch filed the RICO allegations in part based on information obtained from written statements, interviews and affidavits from current and former employees of Defendants, and from information learned through an investigation conducted by his counsel.

   a. The allegations in Mr. Koch's RICO complaint are strikingly similar to the allegations in this case. Mr. Koch again alleged that Defendants had schools at which they trained and encouraged their gaugers to steal by fraudulently understating the volume of product being purchased. Mr. Koch also alleged that a gauger's performance was tied to his ability to create overages for Defendants. Id. at ¶ 102.

b. Mr. Koch described in detail at least one method used by gaugers to create overages. Mr. Koch alleges that gaugers would misstate the information recorded by gaugers on a run ticket. According to Mr. Koch, the gauger would falsify the top gauge, the amount of water in the tank, the temperature, and the bs&w. Id. at ¶ 103.

c. Mr. Koch also alleged that Defendants' gaugers created false tank-tables, which are used to determine how much oil a tank can hold. Id. at ¶ 104.

d. Mr. Koch also alleged that Defendants' gaugers created false meter correction factors so that the meter would mis-state the amount of product purchased, or bypassed the meter all together. Id. at 105.

8. On July 29, 1988, Mr. Koch filed a counterclaim in Koch v. Koch, No. 88-1320-K (D. Kan. 1988). See Doc. No. 281, App. 4. In his counterclaim, Mr. Koch made allegations identical to those raised in February of 1988 in the Oxbow Energy case discussed directly above. Id. ¶¶ 61-75.

9. The information filed with this Court by Plaintiffs in connection with the "original source"/subject mater jurisdictional attacks lodged by Defendants establish that a large majority of the information used by Plaintiffs to support the bringing of this lawsuit was discovered by Plaintiffs prior to September 30, 1988. See Doc. No. 282, App. 8, Ex. A-I; and App. 9. See also, Doc. No. 282, App. 15, ¶ 4.

10. William A. Presley, one of the Plaintiffs, states in his affidavit that

> [b]y June of 1988, based on the statements I had obtained and those from other investigators, I was convinced that Koch and its affiliated companies had indeed been stealing crude oil and natural gas from

> producers for many years by a nationwide and company-wide scheme of intentional mismeasurement, and thus underreporting the amount of product they were taking from producers.
>
> Doc. No. 282, App. 15, ¶ 5.

11. Mr. Presley had also become aware of the FCA itself in June 1988.

12. In July 1988, Mr. Koch met with members or investigators with the United States Senate's Select Committee on Indian Affairs. After this meeting, Mr. Koch began focusing his investigation on federal and Indian leases.

The Tenth Circuit has held that the allegations alleged by Mr. Koch in the two 1988 District of Kansas cases (i.e., Oxbow and Koch) are substantially identical to the allegations in this case. The Tenth Circuit held as follows:

> Allegations that Defendants, by deliberate and systematic mismeasurement, stole crude oil and natural gas from Federal and Indian lands were publicly disclosed on three occasions prior to Precision filing this qui tam action. . . . William Koch, Precision's majority shareholder, raised allegations of crude oil theft in three previous lawsuits. These allegations were embodied as RICO counts in civil suits instituted by William Koch in 1981, 1982, and 1985. See Oxbow Energy, Inc. v. Koch Indus., Inc., 686 F. Supp. 278 (D. Kan. 1988); Koch v. Koch, 1989 WL 87624, No. 88-1320-K (D. Kan. July 19, 1989), aff'd 903 F.2d 1333 (10th Cir. 1990); and Koch v. Koch Indus., Inc., 127 F.R.D. 206 (D. Kan. 1989). Substantial identity exists between the RICO allegations and Precision's FCA allegations. . . . [T]he record [also] reveals these same allegations were disclosed in numerous news releases.

The Precision Co. v. Koch Industries, Inc., 971 F.2d 548, 553 (10th Cir. 1992). Based on the substantial identity of the allegations in this and the Kansas cases, which were filed before September 30, 1988, and based on the undisputed evidence summarized above, the undersigned finds that the "very essence" of the FCA claims at issue in this case were reasonably knowable to Plaintiffs before September 30, 1988.

Plaintiffs argue that the evidence discussed above does not establish that Plaintiffs were aware that "federal" and "Indian" leases were being affected by Defendants' mis-measurement practices. Plaintiffs' argument is inconsistent with the Tenth Circuit's holding in Precision I, which found the allegations in this case that "Defendants, by deliberate and systematic mismeasurement, stole crude oil and natural gas from **Federal and Indian lands**," were substantially identical to those in the two Kansas cases. Also, based on Mr. Koch's involvement at the highest level of Defendants' management structure for almost 20 years, it would be unreasonable to assume that Mr. Koch was unaware of the fact that Defendants' purchased oil and gas from federal and Indian leases. Mr. Koch certainly discovered, prior to September 30, 1988, that Defendants' were intentionally mis-measuring on non-federal and Indian leases. There is nothing in the record which would establish that the fact that Defendants' were mis-measuring on federal and Indian lease was also not "reasonably knowable" to Mr. Koch prior to September 30, 1988.

Plaintiffs also argue that the evidence summarized above establishes only that they were aware that Defendants were stealing product from producers, but not that Defendants' were under-reporting royalties, which is the basis for this lawsuit. The evidence summarized above, and the allegations in the two Kansas lawsuits, clearly establish that Plaintiffs were aware that Defendants' were (1) reporting to producers that they were taking less oil than Defendants were actually taking, and (2) paying producers based on this lower figure. Knowing these facts, Plaintiffs have not explained why it would not have been "reasonably knowable" to them that royalty payments, which are based directly on the amount of product sold, were also being affected by Defendants' alleged mis-measurement.

The undersigned finds that the "very essence" of the FCA claims at issue in this case was reasonably knowable to Plaintiffs before September 30, 1988. Thus, Plaintiffs cannot benefit from the extended statute of limitations provided in 31 U.S.C. 3731(b)(2). Plaintiffs are, therefore, limited to the six-year statute of limitations provided in § 3731(b)(1).[16/]

### D. Conclusion

The six year statute of limitations in 31 U.S.C. § 3731(b)(1) applies in this case. The ten-year statute of limitations in § 3731(b)(2) does not apply to this case because either (1) Congress did not intend § 3731(b)(2) to apply to FCA actions brought by *qui tam* relators; or (2) if Congress intended § 3731(b)(2) to apply to FCA actions brought

---

[16/] Having found that the ten-year statute of limitations in § 3731(b)(2) is not applicable in this case, the undersigned will not address the retroactivity issues which would have had to be addressed if § 3731(b)(2), which was added to the FCA in 1986, were applied to this case. The undersigned expresses no opinion, however, as to the correctness of the retroactivity objections raised by Defendants.

by *qui tam* relators, Congress also intended for the Court to look to the relator's, as well as the government's, knowledge. In this case, the relators were aware of the "essence" of the claims in this case more than three years before this case was filed. Due to their knowledge, Plaintiffs are, therefore, precluded from relying on § 3731(b)(2)'s 10-year statute of limitations.

## CONCLUSION

Pursuant to Fed. R. Civ. P. 15(c), the First Amended Complaint filed in this action (Precision II) relates back to the filing of the original Complaint in this action on September 30, 1991. The Complaint in this action does not, however, relate back to the original Complaint filed in Precision I on May 25, 1989. Thus, the statute of limitations applicable to the claims in the First Amended Complaint was tolled on September 30, 1991, not May 25, 1989.

The statute of limitations applicable to the FCA claims in the First Amended Complaint is the six-year statute in 31 U.S.C. § 3731(b)(1), not the ten-year statute in § 3731(b)(2). Plaintiffs may, therefore, recover for any FCA claim that accrued after September 30, 1985. All parties agree that the FCA claims in the First Amended Complaint accrue when Defendants submit a monthly royalty report to the federal government or to an Indian tribe (e.g., MMS-2014 and Osage Royalty Report) or when Defendants submit a monthly accounting to a 100% division order purchaser (e.g., check stubs).[17/]

For the reasons discussed above, the undersigned recommends that Plaintiffs' motion (doc. no. 260) and Defendants' motion (doc. no. 280) be **GRANTED IN PART and DENIED IN PART**.

---

[17/] The parties' agreement on the accrual of the FCA claims in this case is subject to the objections raised in their objections to the undersigned's January 27, 1999 Report and Recommendation regarding the proper interpretation of the FCA's liability and penalty provisions. See Doc. No. 425, 461 and 462. Plaintiffs believe that run tickets and not MMS-2014 or Osage Royalty Reports should be the triggering event for FCA penalties. Defendants believe that they have no liability under the FCA with respect to the 100% division order payees. Thus, the accrual issue may have to be revisited by the Court depending on how it rules on the objections to the January 27, 1999 Report and Recommendation.

## OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 7 day of March 1999.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 8 Day of April, 1999.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

ENTERED ON DOCKET

DATE APR - 8 1999

CHRISTIAN NJOKU, )
)
Plaintiff, )
)
vs. ) No. 98-CV-19-K
)
TULSA MOTELS, LTD., et al., )
)
Defendants. )

**F I L E D**

APR 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ADMINISTRATIVE CLOSING ORDER**

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7 day of April, 1999.

Terry C. Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| **MURIEL D. BURCH, as parent and next friend of; DARA JONES, a minor; DALE JONES, a minor; DANA JONES, a minor; DESEREE JONES, a minor; and LAYTHATCHER JONES, a minor,** | ) | |
| **Plaintiffs,** | ) | **No. 97-CV-898-K** |
| **vs.** | ) | |
| **LA PETITE ACADEMY, INC., a Delaware corporation; STATE OF OKLAHOMA COMMISSION FOR HUMAN SERVICES; and STATE OF OKLAHOMA DEPARTMENT OF HUMAN SERVICES,** | ) | |
| **Defendants.** | ) | |





**JUDGMENT**

Now on this 28th day of January, 1999, the above-styled matter having come for trial before the undersigned United States District Judge and jury, the latter of which returned a verdict on behalf of Plaintiff and against Defendant on the claims of intentional discrimination under 42 U.S.C. §1981 and negligent supervision, but on behalf of Defendant on the claims of intentional infliction of emotional distress and invasion of privacy. The jury returned a verdict in the amount of Eight Thousand Five Hundred Dollars ($8,500.00) as and for actual damages. The jury, having checked

the box on the jury verdict form that Defendant acted in a way that indicated punitive damages should be awarded, then awarded the sum of One Hundred Fifty Thousand Dollars ($150,000.00) as and for punitive damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs, Dara Jones, Dale Jones, Dana Jones, Deseree Jones and Laythatcher Jones, minors, recover from Defendant La Petite Academy, Inc. the sum of Eight Thousand Five Hundred Dollars ($8,500.00) in compensator y damage and One Hundred Fifty Thousand Dollars ($150,000.00) in punitive damages, with post-judgment interest thereon at the rate of 4.58 percent as provided by law.

**ORDERED this 7 day of APRIL, 1999.**

**TERRY C. KERN, CHIEF**
**UNITED STATES DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



WILLIAM WALTER SCHERMERHORN, )
)
Plaintiff, )
)
vs. ) No. 98-CV-637 B (J)
)
B. BAKER, et al., )
)
Defendants. )



**ORDER**

Plaintiff, appearing *pro se* and *in forma pauperis*, has filed this action pursuant to 42 U.S.C. § 1983 against numerous defendants, in both their individual and official capacities, including B. Baker, R. Greer, Stanley Glanz, Tulsa County Sheriff's Department, Tulsa City/County Jail, Wexford Health Source, Tulsa County, City of Tulsa, Tulsa City Excise Board, Tulsa County Excise Board, six (6) Jane Does and three (3) John Does. Plaintiff has provided summonses and USM-285 Marshal Service Forms for Defendants Baker, Greer and Glanz. For the reasons discussed below, the Court dismisses as defendants Tulsa County Sheriff's Department, Tulsa City/County Jail, Tulsa County, City of Tulsa, Tulsa Excise Board, and Tulsa County Excise Board. In addition, before this action may proceed, Plaintiff must provide a completed summons and USM-285 Marshal Service Form for Defendant Wexford Health Source.

Plaintiff is a prisoner as that term is defined in § 1915A(c) (i.e., a person incarcerated for violations of the criminal law). The Defendants in this case are either governmental entities or employees of a governmental entity. The Court is, therefore, required to conduct an initial

12

review of Plaintiff's complaint. See 28 U.S.C. § 1915A(a). During this review, the Court is required to "identify cognizable claims or dismiss the complaint, or any part of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." 28 U.S.C. § 1915A(b)(1).

Plaintiff is also proceeding *in forma pauperis*. In cases where the plaintiff is proceeding *in forma pauperis*, § 1915(e) provides as follows:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court **shall** dismiss the [*in forma pauperis*] case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted . . . .

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added).

The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim upon which relief can be granted as to either Tulsa County Sheriff's Department or Tulsa City/County Jail. See, e.g., Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).[1] Numerous courts have held that such governmental sub-units or departments are not separate suable entities and are not proper defendants in a section 1983 action. Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985), *vacated on other grounds*, Tyus v. Martinez, 475 U.S. 1138 (1986); Johnson v. City of Erie, 834 F. Supp. 873, 878 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 826 (D. N.J. 1993).

---

[1/] When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pled factual allegations in the complaint as true, and the Court must view all inferences that can be drawn from those well-pled facts in the light most favorable to plaintiff. Viewing the allegations in the complaint through this lens, the Court may grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under either 28 U.S.C. § 1915(e)(2)(B)(ii) or § 1915A(b)(1).

Therefore, Tulsa County Sheriff's Department and Tulsa City/County Jail should be dismissed from this case without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), and 1915A(b)(1).

Also, Plaintiff has named both Stanley Glanz, in his official capacity as Sheriff of Tulsa County, and Tulsa County as defendants. Claims against a government officer in his official capacity are actually claims against the government entity for which the officer works. Kentucky v. Graham, 473 U.S. 159, 167 (1985). Under Graham, Plaintiff's claims against Sheriff Glanz are actually claims against the County of Tulsa. Because Defendant Glanz has been named in his official capacity, it is not necessary to name the County of Tulsa as a separate defendant. Therefore, the Tulsa County should be dismissed from this action.

Furthermore, none of the conduct alleged in Plaintiff's Complaint is alleged to have been committed by any employee or agent of the City of Tulsa, Oklahoma. Rather, all of the conduct is alleged to have been committed by employees of the Tulsa County Jail or by employees of the medical provider for the Tulsa County Jail, Wexford Health Source. None of the defendants is employed by the City of Tulsa. Plaintiff's Complaint fails to allege any facts which would state a claim against the City of Tulsa. Therefore, the City of Tulsa should be dismissed from this case without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), and 1915A(b)(1).

Similarly, Plaintiff's complaint fails to state a claim against the Tulsa City and County Excise Boards. None of the conduct alleged in Plaintiff's Complaint is alleged to have been committed by any member or agent of the excise boards. Rather, all of the conduct is alleged to have been committed by employees of the Tulsa County Jail or by employees of the medical provider for the Tulsa County Jail, Wexford Health Source. Plaintiff's Complaint fails to allege

any facts which would state a claim against the Tulsa City or County Excise Boards.[2] Therefore, the Tulsa City and County Excise Boards should be dismissed from this case without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), and 1915A(b)(1).

In order for this action to proceed against the remaining defendants, Plaintiff must complete and submit a summons and USM-285 Marshal Service Form for Defendant Wexford Health Source.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. The Tulsa County Sheriff's Department, the Tulsa City/County Jail, the County of Tulsa, the City of Tulsa, the Tulsa City Excise Board and the Tulsa County Excise Board are dismissed from this action without prejudice for failure to state a claim upon which relief may be granted.

2. Within thirty (30) days of the entry of this Order, or by May 7th, 1999, Plaintiff shall complete and submit a summons and a USM-285 Marshal Service Form for Defendant Wexford Health Source.

3. The Clerk is directed to send to Plaintiff one blank summons and one blank USM-285 form.

SO ORDERED THIS 7th day of April, 1999.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

---

[2/] Pursuant to statute, county excise boards in Oklahoma are responsible for certifying the levies of each municipality to the county assessor on the same date that such levies are fixed and to fix the levies and make the appropriations of each municipality within fifteen (15) days after the financial statement and estimate of the municipality is filed. Okla. Stat. tit. 68, § 3014 (West 1992).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



KAREN LAYMAN, surviving spouse of James R. Layman, deceased,

Plaintiff,

vs.

HAROLD LAMBERT and the STATE OF OKLAHOMA, ex rel. THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,

Defendants.

Case No. 98-CV-694-BU(J)



# ORDER

This matter came before the Court for hearing on April 8, 1999 upon the Motion to Dismiss, or in the Alternative Motion to Quash Summons on Behalf of George M. Lambert, Jr. Having heard the arguments and having reviewed the record, the Court **ORDERS** as follows:

1. The Motion to Dismiss (Docket Entry #8-1) is **GRANTED**. The Complaint against George M. Lambert, Jr., misnamed in the Complaint as Harold Lambert, is **DISMISSED WITHOUT PREJUDICE**;

2. The Alternative Motion to Quash Summons on Behalf of George M. Lambert, Jr. (Docket Entry #8-2) is **DECLARED MOOT**;

3. The Amended Complaint filed without permission on February 8, 1999 and without service upon Defendants, George M. Lambert, Jr., misnamed as Harold Lambert, and the State of Oklahoma, ex rel., the Oklahoma Department of Public Safety, on February 8, 1999 is **STRICKEN**;

4. In light of the dismissal of the Complaint against Defendant, George M. Lambert, Jr., misnamed as Harold Lambert, and the previous dismissal of the claim under 42 U.S.C. § 1983 against Defendant, the State of Oklahoma, ex rel. the Oklahoma Department of Public Safety, the only claim remaining in this matter is the state tort claim against Defendant, the State of Oklahoma, ex rel. the Oklahoma Department of Public Safety. Pursuant to 28 U.S.C. § 1367(c)(3), the Court **DECLINES** to exercise supplemental jurisdiction over the state tort claim and **DISMISSES WITHOUT PREJUDICE** the Complaint against Defendant, the State of Oklahoma, ex rel., the Oklahoma Department of Public Safety.

ENTERED this 8th day of April, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



THOMAS E. WOLFE,

Petitioner,

vs.

RON WARD, Warden,
Cimmeron Correctional Facility,

Respondent.

Case No. 96-CV-840-K(J)



## STIPULATION OF DISMISSAL

Petitioner agrees to dismiss his habeas corpus petition with prejudice. See Fed. R. Civ. P. 41(a)(1). Petitioner understands that he may not file another habeas petition raising the same claims that were asserted in this case.

Thomas E. Wolfe #178225
Petitioner

Counsel For Petitioner

Counsel For Respondent

29

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| DONALD FRY AND BETTY FRY, Plaintiffs, | ) | |
| v. | ) | Case No. 98-C-452-H |
| AEGIS SECURITY INSURANCE COMPANY, a foreign insurance company, Defendant. | ) | |



**STIPULATION FOR DISMISSAL**
**PURSUANT TO F.R.C.P. 4(A)(1)(ii)**

It is hereby stipulated by Donald Fry and Betty Fry, Plaintiffs, and Aegis Security Insurance Company, a foreign insurance company, Defendant, that the above entitled action can be dismissed with prejudice for the reason that the parties arrived at a full compromise and settlement of this matter.

LAYON, CRONIN, CLARK & KAISER, P.L.L.C.

Joseph F. Clark, Jr., OBA #1706
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124
Attorney for Plaintiffs

CHEEK, CHEEK & CHEEK

Tim N. Cheek, OBA #11257
311 North Harvey Avenue
Oklahoma City, Oklahoma 73102
(405) 272-0621
Attorney for Defendant

JJB\jaa

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | 99-CV-52-BU(E) |
| v. | ) | |
| | ) | |
| WESLEY SMITH, WARREN W. SMITH & ASSOCIATES, WAYNE NUNEMAKER, NUNEMAKER ARCHITECTS, GUY DONOHUE, DONOHUE SERVICE COMPANY, INC., and DOUGLAS R. HAYNES | ) | |
| | ) | |
| Defendants. | ) | |



**NOTICE OF DISMISSAL WITH PREJUDICE**

COMES NOW, the Plaintiff, by and through its attorney Steven K. Mullins, and pursuant to Federal Rule of Civil Procedure 41(a)(1) hereby dismisses with prejudice to its right of filing any further action against the Defendants, Wesley Smith, and Warren W. Smith & Associates, all issues of fact and law having been fully resolved.

STEVEN K. MULLINS OBA 6504
Assistant U.S. Attorney
210 West Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102
405-553-8804
405-553-8885 facsimile
Attorney for the Plaintiff
United States

C25

**CERTIFICATE OF MAILING**

I hereby certify on the 7th day of April, 1999, I deposited a true and correct copy of the foregoing notice of dismissal with prejudice to the following counsel of record in the above styled matter:

Steve Greubel
Ungerman and Iola
P.O. Box 701917
Tulsa, Oklahoma 74170-1917
Attorney for Wayne Nunemaker and Nunemaker Architects

Steven Gray
4530 S. Sheridan
Tulsa, Oklahoma 74145
Attorney for Guy Donohue and Donohue Service Co., Inc.

James Tilly
2 W. 2nd
Tulsa, Oklahoma 74103
Attorney for Douglas R. Haynes

Courtesy copy mailed to:
W. Michael Hill
John J. Bowling
7134 S. Yale, Suite 900
Tulsa, Oklahoma 74136
Attorneys for Wesley Smith and
Warren W. Smith & Associates

STEVEN K. MULLINS

cna\98068\pleadings\dismissalwithprejudice

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| **MELANIE CALDWELL, an individual,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| | ) | |
| **vs.** | ) | **Case No. 98-CV-0668-H (J)** |
| | ) | |
| | ) | |
| **CUST-O-FAB, INC., a corporation,** | ) | |
| | ) | |
| **Defendant.** | ) | |



**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff, Melanie Caldwell, and the Defendant, Cust-O-Fab, Inc., by and through their counsel, and pursuant to Fed. R. Civ. P. 41(a)(1)(i), hereby stipulate to the dismissal of the above captioned and numbered action, with prejudice.

DATED this 6th day of April, 1999.

David W. Davis, OBA #015067
406 South Boulder, Suite 416
Tulsa, Oklahoma 74103
(918) 592-2007 and (918) 582-6106
Attorney for Plaintiff, Melanie Caldwell

John M. Hickey, OBA #11100
Joe M. Fears, OBA #2850
BARBER & BARTZ
One Ten Occidental Place
110 West Seventh Street, Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755 and (918) 599-7756 FAX
Attorneys for Defendant, Cust-O-Fab, Inc.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| **NORAM GAS TRANSMISSION COMPANY,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Case No. 98-CV-534-BU** |
| | ) | |
| **COMSTOCK OIL & GAS, INC.,** | ) | |
| | ) | |
| **Defendant.** | ) | |



**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41, **Plaintiff**, NorAm Gas Transmission Company, and Defendant, Comstock Oil & Gas, Inc., **hereby stipulate** to the dismissal with prejudice of all claims between them in this litigation. This Joint **Stipulation** of Dismissal With Prejudice is entered into pursuant to an agreement made by and **between the** parties that constitutes a complete settlement of all matters at issue in this litigation. **Each party** shall bear its respective costs and attorneys' fees.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,**
**GOLDEN & NELSON, P.C.**

By: _____

J. Kevin Hayes, Esq., OBA #4003
Mark Banner, Esq., OBA #13243
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
Telephone: (918) 594-0400
Facsimile: (918) 594-0505

**ATTORNEYS FOR PLAINTIFF**

-and-

By:_____

James M. Sturdivant, Esq., OBA #8723
GABLE & GOTWALS
100 West Fifth Street, Suite 1000
Tulsa, Oklahoma 74103-4219
Telephone: (918) 585-8141
Facsimile: (918) 588-7873

-and-

J. Robert Beatty, Esq., Texas Bar #01992420
Bradley C. Weber, Esq., Texas Bar #21042470
LOCKE LIDDELL & SAPP, L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
Telephone: (214) 740-8000
Facsimile: (214) 740-8800

**ATTORNEYS FOR DEFENDANT**

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



IN RE:
MICHAEL R. READ, a/k/a/ MIKE READ, a/k/a/ MICHAEL RAY READ,

Debtor,

Case No. 98-CV-887-BU(J)

MICHAEL R. READ,

Appellant,

vs.

SHAWNA K. READ, now Dunn, and SHANNON DAVIS,

Appellees.



## REPORT AND RECOMMENDATION

Appellant, Michael R. Read, asserts that the Bankruptcy Court erred because the Bankruptcy Court did not recognize that the state court deprived him of his constitutional right to due process and notice prior to the entry of a divorce decree. Appellant asserts that the Bankruptcy Court should have found the state court judgment was not binding because Appellant never received proper notice of the proceedings. Appellee filed a response to the appeal and additionally filed a Motion to Dismiss, and a Motion for Damages and Costs. [Doc. Nos. 5-1, 6-1, 6-2]. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**. The Magistrate Judge additionally recommends that Appellee's Motion for Damages and Costs be **DENIED**. [Doc. No. 6-

1]. Appellee requests dismissal of the appeal, asserting, in part, that the Court does not have jurisdiction[1/] to decide this action. The Magistrate Judge recommends that no action be taken on the Motion to Dismiss at this time, due to the recommendation that the decision of the Bankruptcy Court be affirmed.

## I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellee, filed a Petition for Divorce on February 26, 1990 in the District Court of Tulsa County. Ms. Dunn[2/] asserted that she and Mr. Read had been married in May of 1987, and that they had one child during their marriage. A Decree of Divorce was entered by the Court on May 2, 1990. The Decree noted that, "Plaintiff has unsuccessfully attempted service of summons of this cause more than twenty days prior to this date, and has executed service by publication pursuant to 12 OSA, Sec. 2004(3)(a) where service by publication is proper and authorized." See Decree of Divorce, Plaintiff's Exhibit 2, attached to "Designation of Record on Appeal." The

---

[1/] Appellee argues that a final decision of a state court cannot be "appealed" to the federal district courts. Appellee asserts that Appellant should have petitioned the United States Supreme Court for a petition of certioriari. Appellee's argument that "appeals" from a final decision of a state court should proceed to the United States Supreme Court is well taken. However, in this case, Appellant filed a bankruptcy action, and in the course of the bankruptcy, contended that the Bankruptcy Court erred by deciding to give full faith and credit to a decision of the state court. This Court does have jurisdiction to decide whether or not it will give full faith and credit to the determination of the state court. The specific issue in this case appears quite similar to the issue presented to the United States Supreme Court in Heiser v. Woodruff, 327 U.S. 726 (1946). The Heiser Court "granted certiorari upon a petition which raises the questions whether the bankruptcy court re-adjudicate the merits of a cause of action on which a judgment against the bankrupt, proved as a claim in bankruptcy, was entered and may disregard a previous adjudication between the parties that the judgment was not procured by fraud." The Supreme Court addressed the issue on its merits and concluded that the final state court judgment could not be relitigated. The specific jurisdiction issue raised by Appellee was not addressed by the Court.

[2/] Prior to the grant of the Decree of Divorce, "Ms. Dunn," was known as "Ms. Read." To avoid the potential confusion created by referring to "Mr. Read" and "Ms. Read," the Court refers to "Ms. Read" as "Ms. Dunn."

Decree provided that Mr. Read should pay child support in the amount of $403.20 per month during the life of the child, until the child reaches 18 years of age.

Mr. Read filed a Petition to Vacate the Judgment as Void on February 25, 1997. Mr. Read asserted that he was not served by summons and that the notice by publication was defective. Mr. Read contended that Ms. Dunn had not made sufficient effort to ascertain his whereabouts, and that, if Ms. Dunn had exercised reasonable diligence, she would have easily located him. Mr. Read additionally asserted that the Court failed to inquire as to whether Ms. Dunn made a meaningful search of available sources to determine Mr. Read's address prior to permitting service by publication. Mr. Read noted that Ms. Dunn knew his address when she informed the Department of Human Services of his location, and that she knew how to contact him when she gave her attorney his address in an attempted collection effort.

An evidentiary hearing was held on March 5, 1997. The Trial Court denied Mr. Read's Motion and did not vacate the Decree of Divorce. See Final Judgment Denying and Overruling Petition to Vacate Void Judgment of Michael Ray Read, file-stamped May 5, 1997, in the District Court of Tulsa County, Defendant's Exhibit "2," in the Record on Appeal.

Mr. Read appealed the decision of the Trial Court to the Oklahoma Court of Civil Appeals. In an unpublished decision, the Oklahoma Court of Civil Appeals affirmed the decision of the trial court. See Memorandum Opinion from the Oklahoma Court of Civil Appeals, Exhibit 5, attached to "Designation of Record on Appeal." The Court noted that in the petition for divorce Ms. Dunn stated that she had had no contact with Mr.

Read since June 1988 and had been unable, despite the exercise of due diligence, to determine his current whereabouts although his last known address was 320 West Redbud Court, Catoosa, Oklahoma. In addition, the Court observed that the trial court specifically found that Ms. Dunn had "unsuccessfully attempted service of process" in the case, and executed service by publication. The Court noted that "every jurisdictional fact not negatived on the face of the record must be presumed to be true." See Memorandum Opinion from the Oklahoma Court of Civil Appeals, Exhibit 5, attached to "Designation of Record on Appeal" at 5. The Court concluded that nothing in the record "negatives the allegation of due diligence in Plaintiff's verified petition." The Court affirmed the decision of the trial court.

Mr. Read petitioned the court for rehearing, but the request was denied on April 2, 1998. See Docket Sheet, Exhibit 7, attached to "Designation of Record on Appeal." Mr. Read filed a Petition for Certiorari in the Oklahoma Supreme Court. The Petition was denied on June 15, 1998. Docket Sheet, Exhibit 8, attached to "Designation of Record on Appeal."

The record contains a partial transcript of a hearing which occurred on September 21, 1998. See Partial Transcript, Exhibit 9, attached to "Designation of Record on Appeal." Ms. Dunn testified that her only way to contact Mr. Read was "through his parents who had severed any and all ties with me [and] would not return phone calls. . . ." See Docket Sheet, Defendant's Exhibit 7, attached to "Designation of Record on Appeal" at 7. According to Ms. Dunn, she attempted to locate Mr. Read by looking in the phone book, but determined that his parent's number was no longer

listed. Ms. Dunn additionally stated that she attempted to call Mr. Read's brother, but was informed that she had the wrong phone number. Docket Sheet, Defendant's Exhibit 7, attached to "Designation of Record on Appeal" at 14. According to Ms. Dunn, she was unable to locate Mr. Read. Ms. Dunn testified that she last saw Mr. Read in November of 1989, and did not talk to him again until sometime after the entry of the divorce decree. She talked to Mr. Read on the phone; informed her attorney of his location, and her attorney sent a letter to Mr. Read.[3/] In late 1990, according to Ms. Dunn, Mr. Read sent her $100 or $150. Docket Sheet, Defendant's Exhibit 7, attached to "Designation of Record on Appeal" at 10.

Mr. Read filed a complaint in the United States Bankruptcy Court of the Northern District of Oklahoma on August 7, 1998. Mr. Read asserted that Ms. Dunn obtained a default decree of divorce against him by publication and that the judgment was void because he had not been properly served with process. Mr. Read additionally cited to Woodruff, et al. v. Heiser, 150 F.2d 869 (10th ir. 1945),[4/] to support his claim that the Bankruptcy Court had jurisdiction to collaterally attack and vacate the default judgment.

Mr. Read filed a Motion for Summary Judgment in the Bankruptcy Court on September 2, 1998. Mr. Read maintained that Ms. Dunn could have contacted him through his parents. In addition, Mr. Read argued that Ms. Dunn knew where to reach

---

[3/] The letter was dated December 4, 1991.

[4/] This case was reversed by the United States Supreme Court in Heiser v. Woodruff, 327 U.S. 726 (10th Cir. 1946).

him when Ms. Dunn's attorney sent him a letter in December of 1991. Mr. Read also maintains that Ms. Dunn informed the Department of Human Services ("DHS") of his address sometime around March of 1993, and that Mr. Read was subsequently contacted by the DHS. Mr. Read asserted that because Ms. Dunn knew his whereabouts, service by publication was improper. Mr. Read argues that the actions of the Oklahoma courts are violative of the due process clause of the United States Constitution. Mr. Read asserted that pursuant to Woodruff, the Bankruptcy Court had jurisdiction to collaterally attack the state court order. Mr. Read additionally argued that the unpublished memorandum opinion of the Court of Civil Appeals was not *res judicata*, but that the Bankruptcy Court had the authority to inquire into what the highest state court would have decided.

Ms. Dunn filed her response on September 17, 1998. Ms. Dunn contended that she did not know and was unable to ascertain the location of Mr. Read prior to the grant by the court of the decree of divorce. Ms. Dunn acknowledged that her attorney contacted Mr. Read in November 1991, but noted that she had only recently learned of Mr. Read's whereabouts because Mr. Read contacted her and requested visitation with their daughter. Ms. Dunn noted that she filed an Application for Contempt on December 6, 1996, because she had received no child support for six years. Ms. Dunn asserted that the notice given to Mr. Read was in accordance with all constitutional requirements. Ms. Dunn notes that at the time of the divorce, Mr. Read's whereabouts were not known, and that service by publication was therefore proper. Ms. Dunn additionally asserted that the state court judgment is entitled to full

faith and credit and cannot be collaterally attacked through a proceeding in Bankruptcy Court.

The Bankruptcy Court entered a Memorandum Opinion on October 19, 1998. The Bankruptcy Court noted that Mr. Read had a full and fair opportunity to litigate whether or not service of process prior to the entry of the divorce decree was adequate, that the state trial court decided against Mr. Read, that Mr. Read appealed, that the state appellate court decided against Mr. Read, that Mr. Read appealed, and that the state supreme court declined certiorari. The Bankruptcy Court concluded that Mr. Read was provided an opportunity to litigate the specific issue which he raised in the Bankruptcy Court and that therefore the judgment of the state court was entitled to full faith and credit. The Bankruptcy Court additionally analyzed the Oklahoma statute upon which the service in the divorce decree was based. The Bankruptcy Court concluded that the Oklahoma service provisions "passed constitutional muster."

Mr. Read appeals the Bankruptcy Court's decision. Ms. Dunn filed a Motion to Dismiss Mr. Read's appeal. [Doc. No. 5-1]. Ms. Dunn additionally requests her costs for pursuing this appeal, and damages against Mr. Read. [Doc. No. 6-1].

## II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be

reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

## III. ANALYSIS

Mr. Read asserts that: (1) the default judgment by publication was improper because minimum due process required notice to be mailed to Mr. Read, (2) the Bankruptcy Court erred in declining to set aside the April 30, 1990 judgment based on principles of *res judicata* and collateral estoppel, (3) he does not challenge the constitutionality of the Oklahoma service statute, but does challenge that the statute was followed in his case.

Appellant's challenge is based on his lack of notice, improper service, and the resulting violation of due process which Appellant asserts occurred when the Oklahoma Courts entered a Decree of Divorce. For the purpose of this Report and Recommendation, the divorce decree action shall be referred to as the "first state court action." Appellant subsequently filed a Motion to Vacate the divorce decree. The Motion to Vacate proceeding and subsequent appeals shall be referred to as "the second state court action." Appellant's argument that he was denied notice and that the Bankruptcy Court erred in finding against Appellant fails to consider the effect of the second state court action.

Appellant filed a Motion to Vacate the decree of divorce in the state court. The trial court held an evidentiary hearing on the motion to vacate. The specific issues presented to the state court in the second state court action were whether or not service by publication in the first state court action was proper, whether or not

Appellee reasonably attempted to determine the whereabouts of Appellant in the first state court action, and whether or not the requirements of due process were met in the first state court action. Following the evidentiary hearing in the second state court action, the trial court denied Appellant's Motion to Vacate finding that service was proper. Appellant appealed to the Oklahoma Court of Civil Appeals, and the trial court decision was affirmed. Appellant filed a motion to reconsider, and it was denied. Appellant filed a writ of certiorari to the Oklahoma Supreme Court, and it was denied. Appellant is asking this Court to reconsider and relitigate the issues which were fully litigated by the Oklahoma courts in the second state court action. There is no suggestion or argument by Appellant that Appellant did not receive notice and a full opportunity to litigate the issues in the Motion to Vacate (the second state court action).[5/] This Court must accept the final judgment of the state court.[6/]

Appellant asserts that he was denied the opportunity to litigate paternity and child support issues in the initial decree of divorce.[7/] Appellant's assertion may be

---

[5/] Appellant filed the Motion to Vacate, so Appellant obviously had notice of the second state court action.

[6/] In Heiser v. Woodruff, 327 U.S. 726, 731 (1946), which Appellant relied on in the proceeding before the Bankruptcy Court, the Supreme Court noted:

> [W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court.

[7/] Appellant complains that the "Bankruptcy Court failed to find that Dunn had mailed notice to the Defendant at his last known address. . . ." The Bankruptcy Court did not reach any of these issues, however, because the Bankruptcy Court concluded that the decision of the Oklahoma court that proper notice procedures had been followed (the second state court action) must be given full faith and credit by this Court. The second state court action concluded that the procedural requirements had been properly followed in the (continued...)

correct. In accordance with Appellant's argument, Appellant can litigate the issues decided in the first state court action only if notice in the first state court action was inadequate and did not comply with due process. However, the second state court action addressed and considered whether notice was adequate. The state court judgment in the second state court action, which was appealed to the highest court of the state, was decided in favor of Appellee, and resulted in a decision that notice in the first state court action was sufficient. Appellant had a full and fair opportunity to litigate the issues of notice and due process in the second state court action, and cannot, in a proceeding in this Court, collaterally attack that state court judgment.

This Court must give full faith and credit to the judgment in the second state court action. The court, in the second state court action, concluded that Appellant was given notice and due process in the first state court action. Appellant cannot now challenge and expect this Court to address issues which have already been challenged and finally decided in a prior state court proceeding.[8/]

Appellant additionally argues that this Court should not give full faith and credit to a judgment which was obtained but lacked due process. Appellant's argument fails to take into consideration which judgment will be given full faith and credit by this

---

[7/] (...continued)
first state court action. Thus Appellant cannot now collaterally attack the first state court action because Appellant already had an opportunity to fully litigate these exact issues in the second state court action. The Memorandum Opinion of the Bankruptcy Court additionally cites Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) and Fent v. Oklahoma Natural Gas Co., 898 P.2d 126, 133 (Okla. 1994).

[8/] As noted by Appellee in Appellee's Motion to Dismiss. The appropriate challenge to the final state court decision would have been a petition to the United States Supreme Court for a writ of certiorari.

Court. This Court is giving full faith and credit to the judgment in the second state court action - which concluded that Appellant did properly receive notice in the first state court action. Appellant certainly received notice and a full and fair opportunity to litigate the issues in the second state court action.[9/] The second state court action fully and finally determined that service of process in the first state court action was proper. Since that is Appellant's sole basis for "attacking" the judgment in the first state court action, that basis must fail because the judgment in the second state court action concluded that notice was proper, and this Court is obligated by the principles of full faith and credit to abide by that judgment.

Appellant asserts that he appropriately filed this lawsuit in federal court because he is arguing that he was deprived of his constitutional rights, and lawsuits challenging constitutional violations should be brought in federal court. Appellant cites to two cases in which the constitutionality of a state statute was challenged. Appellant, in this case, however, has conceded that he is not challenging the constitutionality of the state statute.

**RECOMMENDATION**

The United States Magistrate Judge recommends that the District Court **AFFIRM** the decision of the Bankruptcy Court. The Magistrate Judge additionally finds that Appellant's appeal was not frivolous and recommends that Appellee's Motion for Damages and Costs be **DENIED**. [Doc. Nos. 6-1, 6-2].

---

[9/] Appellant initiated the second state court action.

**OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 6th day of April 1999.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 7th Day of April, 1999.

C. Portillos, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



NORRIS WAUQUA, )
)
Petitioner, )
)
v. ) Case No. 99-CV-0226B-(E)
)
RON CHAMPION, )
Warden, )
)
Respondent. )



## REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, although he entitles it a "Petition for Extraordinary Relief Pursuant to 28 U.S.C., Section 2241 and Pursuant to 28 U.S.C., Section 1651 (The 'AllWrits Act')." (Docket # 1). A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996); see also McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997). It is clear from a review of the petition that petitioner is challenging the validity of his conviction and sentence and not the execution. Thus, the petition was filed in this district as a petition under 28 U.S.C. § 2254. The Court has referred this matter to the undersigned for Report and Recommendation. See 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that this action be transferred to the Western District of Oklahoma.[1]

---

[1] Petitioner has also filed a Motion for Leave to File Supporting Brief in Excess of Page Limit (Docket # 7), a Motion for Appointment of Counsel (Docket # 8), a Motion for Transcripts and Documents (Docket # 9), and Motion for Evidentiary Hearing (Docket # 10).

A prisoner in custody pursuant to the judgment and sentence of a State court in a State which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, petitioner is incarcerated at Dick Conner Correctional Center in Hominy, Oklahoma, located within the jurisdictional territory of the Northern District of Oklahoma. 28 U.S.C. § 116(a). However, petitioner was convicted in Cotton County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c). Petitioner has previously filed a petition for writ of habeas corpus under § 2254 in the Western District of Oklahoma in Case No. CIV-92-00147-C, and the Tenth Circuit Court of Appeals affirmed the Western District's denial of his petition in Case No. 93--6127. Although the Court could deny the Petition as a second or successive petition under 28 U.S.C. § 2244, this Court does not have before it the previous petition or its disposition by the Western District. In addition, petitioner sets forth constitutional issues that the Western District, having previously reviewed the matter, is in a better position to consider.

The undersigned finds that the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available. Therefore, in the furtherance of justice, the undersigned recommends that this matter be transferred to the Western District of Oklahoma.

## OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992).

Dated this 6th day of April, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on this 7th Day of April, 1999.

C. Portillo, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**



| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 96-CR-113-C |
| | ) | 99CV229C(E) |
| DAN LESLIE MEADOR, | ) | |
| | ) | |
| Defendant. | ) | |



**JUDGMENT**

This matter came before the Court for consideration of defendant Dan Meador's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, Meador, on his challenge to the legality of his conviction and sentence.

IT IS SO ORDERED this 2nd day of April, 1999.

H. Dale Cook
United States District Judge

84/2

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**



| | | |
|---|---|---|
| LORI B. DOLL,<br><br>Plaintiff,<br><br>vs.<br><br>HEWLETT-PACKARD COMPANY EMPLOYEE BENEFITS ORGANIZATION INCOME PROTECTION PLAN, and VOLUNTARY PLAN ADMINISTRATORS, INC.,<br><br>Defendants. | ) | Case Number 99CV082 C (J) |



**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, Lori B. Doll, and Defendants, Hewlett-Packard Company Employee Benefits Organization Income Protection Plan, and Voluntary Plan Administrators, Inc., hereby jointly stipulate for the dismissal of this entire action with prejudice, pursuant to Fed.R.Civ.P. 41(a)(1).

David Humphreys, OBA #12346
**HUMPHREYS WALLACE HUMPHREYS**
1724 East Fifteenth Street
Tulsa, Oklahoma 74104
(918) 747-5300

Attorneys for Plaintiff

Timothy A. Carney, OBA #11784
**GABLE & GOTWALS**
2000 NationsBank Center
15 West Sixth Street, Suite 2000
Tulsa, Oklahoma 74119-5447
(918) 582-9201

Attorneys for Defendants, Hewlett-Packard Company Employee Benefits Organization Income Protection Plan, and Voluntary Plan Administrators, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SANDRA GARRETT,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO.,

Defendant.

Case No. 97-C-1134-B



**ADMINISTRATIVE CLOSING ORDER**

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by 5-28-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

**IT IS SO ORDERED** this 6th day of April, 1999.

THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



UNITED STATES OF AMERICA, )
)
Appellant, )
v. ) Case No. 97-CV-543-H(J)
)
)
THE FIRST NATIONAL BANK OF BOSTON, )
)
Appellee. )



ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 14) recommending that this Court affirm the Bankruptcy Court's determination that the First National Bank of Boston is entitled to a superpriority claim pursuant to 11 U.S.C. § 507(b). Appellant has filed an objection to the Report and Recommendation.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

The Magistrate Judge recommended that the Court affirm the Bankrupcty Court's determination as to the First National Bank of Boston's claim. Appellant objected, arguing that the claim was not entitled to treatment as a superpriority claim under 11 U.S.C. § 507(b). Based upon a careful review of the Report and Recommendation of the Magistrate Judge, Appellant's

16

objection, and the record in this matter, the Court finds that the Report and Recommendation affirming the Bankruptcy Court's decision (Docket # 14) should be adopted. Thus, the decision of the Bankruptcy Court in this matter should be, and is hereby, affirmed.

IT IS SO ORDERED.

This 2ND day of April, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAZEL STACY,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-181-H



**ORDER**

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 4).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge (Docket # 4). Accordingly, it is hereby ordered that this matter is to be transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED.

This 2ND day of April, 1999.

Sven Erik Holmes
United States District Judge

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**



| | | |
|---|---|---|
| **THOMAS EUGENE JOHNSON,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 99-CV-0054-H (E)** |
| | ) | |
| **GARY GIBSON, Warden,** | ) | ENTERED ON DOCKET |
| | ) | |
| **Respondent.** | ) | DATE APR - 7 1999 |

**REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 2254, petitioner Thomas Eugene Johnson filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the 90-year sentence he received after a jury convicted him on September 17, 1980 of First Degree Rape in Case No. CRF 80-1457, Tulsa County, Oklahoma. He alleges that his trial counsel was ineffective for failing to raise an issue as to age of the victim in his case. Petitioner states that, post-conviction, he moved several times for appointment of counsel to raise this issue. He does not indicate when any of these claims were filed, but he claims that they were all denied on August 26, 1998.

The record before this Court does not reflect any appeal from his post-conviction requests for appointment of counsel. Further, it does not indicate that he filed or appealed any post-conviction application. Nor does it indicate whether he raised the issue when he filed his direct appeal. The Court of Criminal Appeals affirmed the conviction by an unpublished opinion issued August 31, 1982. Respondent did not attach any copies of the opinion or briefs on appeal.

Petitioner makes several contradictory statements in his petition as to whether he appealed his post-conviction requests for appointment of counsel and whether he raised the issue when he filed his direct appeal from the judgment of conviction. Moreover, his petition reflects his profound

misunderstanding of the procedures required to properly challenge his conviction. Unfortunately for petitioner, he has waited too late to file his petition for federal habeas review.

**Statute of Limitations**

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 101 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Under the AEDPA,

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented for filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

22 U.S.C. § 2244.

Since petitioner's state conviction became final prior to the enactment of the AEDPA, he had one year from April 24, 1996, to file an application for federal habeas relief. See 28 U.S.C. § 2244(d)(1); Hoggro v. Boone, 150 F.3d 1223, 1225 (10th Cir. 1998). Furthermore, he might have

been able to toll the statute of limitations if a properly filed application for post-conviction relief or other collateral review was pending during that one-year grace period before April 24, 1997. See 28 U.S.C. § 2244(d)(2); Barnett v. Lemaster, 167 F.3d 1321 (10th Cir. 1999). Petitioner does not indicate when he filed any of his post-conviction applications. If all were denied on August 26, 1998, as he asserts, it appears highly unlikely that they were pending from before April 24, 1997, the end of the grace period.[1]

Petitioner filed a letter on February 3, 1999, explaining that he did not file motion to proceed *in forma pauperis* within the one-year time limit because he was intimidated by an individual who stood in front of the prison's law library. He also states, in his petition for writ of habeas corpus, that he is unfamiliar with the law and does not know how to request service, and the inmates at the law library refuse to help him. (Petition, at 7, Docket # 1.) These allegations, without more, do not excuse petitioner's tardiness. Although the limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998), petitioner has not shown that he is entitled to such equitable relief. If his allegations excuse his failure to diligently pursue his claims, almost every prisoner seeking habeas relief could circumvent the statute of limitations.

**Failure to Exhaust State Remedies**

Even if petitioner had filed his petition within the applicable period of limitations, or if he could show that the cumulative time period in which he has been pursuing state post-conviction relief or collateral review tolls the applicable period of limitations, he has failed to exhaust his state

---

[1] The Court notes that petitioner previously filed an application for federal review in this District on October 21, 1998 (Case No. 98-CV-820C), and that petition was dismissed without prejudice on January 14, 1999, due to petitioner's failure to pay the filing fee.

remedies. Although he is precluded from refiling for federal habeas relief, he is not foreclosed from pursuing his claim in state court as respondent has outlined in the February 26, 1999 motion to dismiss for failure to exhaust state court remedies (Docket # 4). Petitioner failed to respond to the motion to dismiss within fifteen (15) days after it was filed, as directed by the January 25, 1999 Show Cause Order. On this basis alone, the Court could deem the matter confessed and enter the relief requested. N.D. LR 7.1. However, the undersigned deems granting respondent's motion based on petitioner's failure to exhaust his state remedies and on petitioner's failure to file his petition within the one-year statute of limitations the better course of action.

Federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner has exhausted the available state court remedies if "state corrective process" is available and if circumstances do not exist that render the process "ineffective" to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir.), cert. denied, 506 U.S. 924 (1992). To exhaust a claim, petitioner must have "fairly presented" the facts and legal theory supporting a specific claim to the highest state court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971); Demarest, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the Oklahoma Court of Criminal Appeals. The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981); see also Coleman v. Thompson, 501 U.S. 722, 730 (1991); Demarest, 130 F.3d at 932.

Despite petitioner's assertions to the contrary, it is clear that petitioner has failed to present the facts and legal theory supporting his claim to the highest state court. He has not appealed the denial of his post-conviction requests for appointment of counsel to the Oklahoma Court of Criminal Appeals and he has not shown that he raised the issue for the Oklahoma Court of Criminal Appeals to review when he filed his direct appeal from the judgment of conviction. Petitioner has failed to exhaust all available state court remedies.

## CONCLUSION

For the reasons set forth herein, the undersigned recommends that Thomas Eugene Johnson's Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**.

## OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) and § 2254, Rules 8, 10. **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** *See Thomas V. Arn*, 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

IT IS SO ORDERED this 5th day of April, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of April, 1999.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



JULIE COOK, an individual, )
)
Plaintiff, )
)
vs. ) No. 98-CV-0160-B(J)
)
MIDWESTERN OFFICE PRODUCTS, )
a corporation, dba SCOTT RICE, )
)
Defendant. )



**ORDER**

This case was tried to a jury on February 16-19, 1999. The jury returned a verdict for the Plaintiff against Defendant on Plaintiff's theory of damages under the Oklahoma Protection of Labor Act in the amount of $11,652.52, which was doubled as required by the Act. On Plaintiff's alleged claim under Title VII for gender discrimination, pregnancy discrimination and constructive discharge, the jury found for Defendant regarding gender discrimination and constructive discharge, but found for Plaintiff regarding pregnancy discrimination and awarded compensatory damage of $25,000.00.

Defendant seeks a Fed.R.Civ.P. 50(b) motion for judgment as a matter of law regarding the verdict for Plaintiff under Title VII for pregnancy discrimination and the awarding of $25,000.00 compensatory damages. Alternatively, Defendant seeks a new trial pursuant to Fed.R.Civ.P. 59(a). Defendant does not take issue with the jury award for $23,305.04 ($11,652.52 (x 2)) for violation of the Oklahoma Protection of Labor Act claim.

109

Following a review of the matter the Court concludes material issues of fact were presented by the evidence regarding Plaintiff's Title VII pregnancy discrimination claim (42 U.S. §2000e-(k)), and damages related thereto. The Court concludes the award of compensatory damages is reasonable and thus should be permitted to stand.

Regarding the issue of Plaintiff failing to file a timely complaint of pregnancy discrimination, the Court concludes evidence supports the alleged violation was a continuing violation (demotion from commission sales and nonpayment of commissions). *See Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414-15 (10th Cir. 1993); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1543 (10th Cir. 1987). The Court further finds the Intake Questionnaire filed on August 23, 1996 with the OHRC sufficiently meets the notice requirements of 42 U.S.C. §2000e-5(e) to bring those violations within the 300-day time period. *Peterson v. City Of Wichita, Kansas*, 888 F.2d 1307 (10th Cir. 1989).

Therefore, Defendant's Rule 50(b) motion for judgment as a matter of law is overruled, and the alternative Rule 59(a) motion for new trial is likewise overruled.

DATED this 2nd day of April, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| BED-CHECK CORPORATION<br><br>Plaintiff,<br><br>v.<br><br>EMERALD RESOURCES, INC., and JAMES B. CONNORS<br><br>Defendants. | ) | Case No. CIV ~~98~~-C-901-BU<br>consolidated with<br>Case No. CIV 98-C-71-BU |

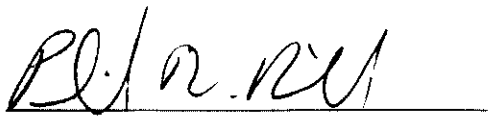


STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Bed-Check Corporation, and the Defendants, Emerald Resources, Inc., and James B. Connors and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree that the above captioned cause, and all claims and counterclaims asserted therein, be dismissed with prejudice to the refiling thereof.

VICTOR MORGAN
Crowe & Dunlevy
500 Kennedy Building
321 South Boston Ave.
Tulsa, Oklahoma 74103
(918)592-9800 *telephone*
(918)592-9801 *facsimile*

ATTORNEY FOR BED-CHECK



PHIL RICHARDS, ESQ.
Nine E. Fourth, Suite 910
Tulsa, Ok 74103
(918) 585-2394

ATTORNEY FOR EMERALD RESOURCES, INC.,
and JAMES CONNORS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



DUANE VERRETT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE SABRE GROUP, INC., a Delaware corporation,

Defendant.

Case No. 97-CV-782-K(J)



**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW Plaintiffs and Defendant and stipulate to the dismissal with prejudice of the claim of Duane Verrett (only), each party to bear its own costs with regard to said claim. This stipulation is made pursuant to Rule 41 (a) (1) (ii).

The case remains pending as to the other Plaintiffs who have joined the action.

Respectfully submitted,

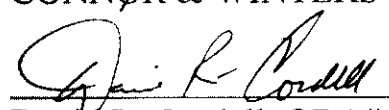
FRASIER, FRASIER & HICKMAN

By: _____

Steven R. Hickman, OBA#4172
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724
Attorney for Plaintiffs

and

CONNOR & WINTERS

By: 

David R. Cordell, OBA#11272
15 E. 5th Street, Suite 3700
Tulsa, OK 74103
918/586-5711
Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**



EDWARD FERRELL & DON ESTES

Plaintiffs

vs.

THE STATE OF OKLAHOMA OFFICE OF JUVENILE AFFAIRS (LLOYD E. RADER CENTER)

Defendant

**Case No. 98-CV-0536K (J)**



**DISMISSAL WITHOUT PREJUDICE**

Plaintiffs, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismiss this cause without prejudice to the filing of a subsequent action. Approval of the Court is not necessary since Defendant has not filed herein (a) an Answer, or (b) a Motion for Summary Judgment.

By: _____
Jeff Martin, OBA #15573
624 S. Denver Ave., Suite 202
Tulsa, Oklahoma 74119
(918) 583.4165
Counsel for the Plaintiff

**Certificate of Mailing**

I, Jeff Martin, do hereby certify that on the 5th day of April, 1999, I mailed a true and correct copy of the foregoing instrument, with postage fully prepaid thereon, to:

Wayne Johnson, Esq.
Assistant Attorney General
P.O. Box 268812
Oklahoma City, Oklahoma 73126-8812

_____
Jeff Martin, OBA #15573

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 99CV0045B(E) |
| JACQUELINE F. LYNCH, | ) | |
| Defendant. | ) | |

ENTERED ON DOCKET

DATE APR 05 1999

**DEFAULT JUDGMENT**

This matter comes on for consideration this 2nd day of April, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Jacqueline F. Lynch, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jacqueline F. Lynch, was served with Summons and Complaint on January 19, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jacqueline F. Lynch, for the principal amount of $4,032.04, plus accrued interest of $1,774.37, plus administrative charges in the amount of $12.90, plus interest thereafter at the rate of 8 percent

9

per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.732 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| **CHET BAKER ENTERPRISES, L.L.C., an Oklahoma limited liability company, CAROL A. BAKER, DEAN BAKER, PAUL BAKER and MELISSA BAKER, individual Oklahoma citizens,** | ) |  |
| **Plaintiffs,** | ) | |
| **vs.** | ) | |
| **PARAMOUNT PICTURES CORPORATION, a Delaware corporation,** | ) | |
| **Defendant.** | ) | **Case No. 98-CV-0921-B (M)** |

**DISMISSAL WITHOUT PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiffs Chet Baker Enterprises, L.L.C. , Carol A. Baker, Dean Baker, Paul Baker and Melissa Baker hereby dismiss this action without prejudice.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.**

By: _____

J. Patrick Cremin, OBA #2013
Donald L. Kahl, OBA #4855
320 South Boston Avenue
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

**ATTORNEYS FOR PLAINTIFF CHET BAKER ENTERPRISES, L.L.C., CAROL A. BAKER, DEAN BAKER, PAUL BAKER and MELISSA BAKER**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**



| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 89-CR-137-C |
| | ) | 99CV222C(E) |
| ROBERT L. JOHNSON, | ) | |
| | ) | |
| Defendant. | ) | |



**JUDGMENT**

This matter came before the Court for consideration of defendant Robert Johnson's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed previously,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, Johnson, on his challenge to the legality of his conviction and sentence.

IT IS SO ORDERED this 2nd day of April, 1999.

H. Dale Cook
U.S. District Judge

95/2

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| **BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Case No. 98-CV-0248-EA (Base File)** |
| **BINGHAM SAND AND GRAVEL, INC. and BINGHAM TRANSPORTATION, INC.,** | ) | |
| **Defendants.** | ) | |
| **GARY DEAN McMACKIN,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Case No. 98-CV-0703-EA (Consolidated)** |
| **BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, et al.,** | ) | |
| **Defendants.** | ) | |



**ORDER**

Now before the Court is the Combined Motion and Brief for Partial Summary Judgment (Docket # 28) filed by Burlington Northern and Santa Fe Railway Company ("Burlington") and James O. Davidson. The parties have consented to proceed before a United States Magistrate Judge in accordance with the provisions of 28 U.S.C. § 636(c).

**BACKGROUND AND PROCEDURAL HISTORY**

These consolidated actions arise out of a collision between a truck and a train at a railroad grade crossing near Quapaw, Ottawa County, Oklahoma in July 1996. Gary Dean McMackin, the driver of the truck, filed a personal injury suit on October 30, 1997, in the District Court of Ottawa

County, Oklahoma, Case No. CJ-97-325. At the time of the collision, McMackin was an employee of Bingham Transportation, Inc. ("Bingham Transportation"), and he drove a truck owned by Bingham Sand and Gravel, Inc. ("Bingham Sand") (collectively "Bingham"). McMackin alleged that Burlington and Davidson, the train's engineer, were negligent in failing to keep a proper lookout and properly warn of the train's approach to the crossing where the collision occurred. Burlington and Davidson answered, alleging that McMackin was negligent in failing to (1) comply with state law; (2) look for a train; (3) stop for the train; (4) keep a proper lookout; and (5) keep his vehicle under proper control. Burlington also filed a cross-petition/counterclaim for damage to its locomotive and its tracks. Further, Burlington removed the case to this Court, Case No. 97-CV-1026.

On April 1, 1998, Burlington sued Bingham in this Court, Case No. 98-CV-248, and Bingham and McMackin sought to consolidate the two actions. Burlington's claims in Case No. 98-CV-0248 are similar to its counterclaim and defenses in Case No. 97-CV-1026. Burlington claims that it suffered property damage to its locomotive and its tracks as a result of McMackin's negligence in (1) failing to keep a proper lookout; (2) failing to keep his vehicle under proper control; (3) traveling too fast for conditions; (4) failing to heed the warning signs; (5) failing to stop his vehicle in accordance with Oklahoma law; (6) failing to drive at an appropriately reduce speed when approaching a railroad crossing; and (7) failing to yield the right of way to the train. Burlington alleges that Bingham Transportation is vicariously liable for McMackin's actions. It also alleges that Bingham Transportation provided McMackin with the defective truck and failed to properly train him. Finally, Burlington claims that Bingham Sand negligently entrusted McMackin and Bingham Transportation with the defective truck. Bingham filed a counterclaim against Burlington and a third-

party complaint against Davidson, based on claims of negligence resulting in the loss of the Bingham truck. The third-party complaint has been dismissed. (Order, Case No. 98-CV-0248, Docket #8).

On April 22, 1998, the District Court remanded Case No. 97-CV-1026 because Burlington and Davidson failed to establish that the amount in controversy exceeded $75,000, and denied the motion to consolidate as moot. On September 15, 1998, Burlington and Davidson again removed the state court case to this Court, Case No. 98-CV-0703, claiming that they were able to obtain evidence to establish that the amount in controversy exceeds $75,000. The two cases have been consolidated. Partial summary judgment has previously been granted in favor of Burlington and against Bingham and McMackin on the issue of the adequacy of the grade crossing warning devices. See Orders, Case No. 98-CV-0248 (Docket ## 22, 31).

Burlington now seeks partial summary judgment as to Bingham and McMackin's claims of negligence with respect to the adequacy of the locomotive's warning devices, the reasonableness of the train's speed, and the actions of the train crew in keeping a reasonable lookout, slowing the train to avoid collision, and sounding the train's whistle. Davidson seeks summary judgment as to all claims brought by Bingham and McMackin. Bingham and McMackin oppose summary judgment, essentially claiming that there are genuine issues of material fact as to: (1) whether the engineer sounded the locomotive whistle as required; (2) whether the independent brake on the locomotive was working properly; (3) whether the train was traveling too fast, given the specific, individualized

hazard presented by conditions at the crossing when the collision occurred; and (4) whether the train crew failed to maintain a proper lookout.[1]

## STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff. Anderson, 477 U.S. at 252.

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garrett v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

---

[1] This statement of the issues subsumes several sub-issues set forth by Bingham and McMackin, or, more appropriately, it is an effort to restate precisely what Bingham and McMackin set forth in several different ways in their Response Brief in these consolidated cases(Docket # 29) and a brief filed in Case No. 97-CV-1026 incorporated by reference in their Response Brief.

## REVIEW

### 1. The Whistle

Non-movants Bingham and McMackin do not dispute any material facts concerning the adequacy of the locomotive's warning devices, nor do they dispute that federal law preempts state law regarding proper warning equipment on locomotives. Indeed, they have no claim that the locomotive warning devices were inadequate. Their claim is that one of the locomotive warning devices, the train whistle, was not sounded as required by Okla. Stat. tit. 66, § 126.[2] Thus, movants Burlington and Davidson are entitled to judgment as a matter of law as to the adequacy of the locomotive warning devices.

As to whether the engineer sounded the whistle, summary judgment is not appropriate. See, e.g., Cox v. Norfolk and Western Ry. Co., 998 F. Supp. 679, 688-89 (S.D.W. Va. 1998). Burlington and Davidson submitted an excerpt from Davidson's deposition testimony, in which he testifies that he sounded the whistle at the whistle board and continued to sound the whistle until the collision occurred. Bingham and McMackin submitted an excerpt from McMackin's testimony, in which he testified that he did not hear the whistle. They also submitted other deposition excerpts which call into question whether the engineer sounded the whistle. Edward Abell and Murl Cooper testified that

---

[2] Okla. Stat. tit. 66, § 126 provides:

> A bell of at least thirty (30) pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty (80) rods from the place where the said railroad shall cross any other road or street . . . , and [the railroad] shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

Although the Secretary of Transportation has been directed to implement regulations requiring the sounding of a locomotive whistle at railroad grade crossings (49 U.S.C. § 20153), the Secretary has not yet issued such regulations (see generally 63 Fed. Reg. 28549 (1998) and 63 Fed. Reg. 40151 (1998)).

they heard a person who was employed by the railroad and on the train tell McMackin, immediately after the collision, that the whistle was not blown. Nina Brown, who lives near the crossing, testified that she did not hear the whistle prior to the collision. An eyewitness to the accident, Rodney Dwayne Bowen, stated that he heard the whistle when the train was near a crossing to the northeast of the crossing where the collision occurred. Donald Earl Dooley and Timothy Lee Stone, who worked at a nearby plant, testified that they heard the whistle and the collision. Given this conflicting testimony, whether the whistle blew is clearly a disputed question for the jury.

**2. The Brake**

Bingham and McMackin also claim that there is a genuine issue of material fact as to whether the independent brake on the locomotive was working properly, and whether Davidson failed to properly inspect the locomotive to determine whether the brake was working.[3] Burlington and Davidson have not specifically moved for motion for summary judgment on this issue, and, in fact, they do not even mention the issue in their brief. To the extent that Davidson moves for summary judgment as to all claims against him, and to the extent that this issue is included in Burlington's motion for partial summary judgment, if at all, the motions are denied.

**3. The Speed**

Bingham and McMackin do not dispute that the train was traveling within the maximum allowable operating speed for the class of track on which it was traveling when the collision occurred.

---

[3] The only place in their brief where Bingham and McMackin mention the failure to inspect is in a proposition header regarding inadequate warning devices (Resp. Br. at 4, Docket # 29). Their expert witness submitted an affidavit which states that the locomotive's independent brake may have been nullified. Thus, a factual issue exists as to whether such brake nullification existed and, if so, whether it would have been detected on proper inspection.

Nor do they dispute that federal law preempts state law as to the maximum allowable speeds.[4] Thus, Burlington and Davidson are entitled to judgment as a matter of law as to any claim that the train was traveling in excess of the Federal Railroad Administration (FRA) track speed. Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421, *et seq.*, recodified 49 U.S.C. § 20106 *et seq.*; 49 C.F.R. § 213.9(a).

As Bingham and McMackin point out, the real issue is whether the train was traveling at a reasonable speed given the specific, individualized hazard, if any, at the railroad grade crossing at the time of the collision. All of the parties discuss this issue in terms of the reasonableness of the train crew's actions.[5] Burlington and Davidson frame this issue as whether the train crew has the right to assume that vehicle drivers will obey the law and whether the train crew has a duty to slow or attempt to stop the train for traffic approaching a crossing. Bingham and McMackin frame the issue as the duty of the train crew to slow or stop the train to avoid a "specific, individualized hazard"; they allege the following "specific, individualized hazards" existed when and where the collision with McMackin occurred: (1) part of the truck had crossed the tracks; (2) the locomotive was operated "nose-first"; (3) the angle of the road and crossing was hazardous; and (4) trees and vegetation along the tracks obstructed the view at the crossing. (See Resp. Br. filed in Case No. 97-CV-1026 (Docket # 17) which is incorporated into the Resp. Br. filed herein (Docket # 29).) They argue that these hazards created a duty for Davidson to slow or stop the train at the crossing.

---

[4] The parties do not rely upon the "savings clause" of the FRSA. The savings clause (currently at 49 U.S.C. § 20106) allows state laws in certain circumstances even though otherwise preempted. See CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 (1993).

[5] The parties also include in this category the issue of whether the train crew blew the whistle, which has been previously discussed.

The phrase "specific, individualized hazard" stems from a footnote in CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), a wrongful death action. The Supreme Court held that federal law preempts state common law negligence claims based on allegations of excessive train speed, but commented:

> Petitioner is prepared to concede that the pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid *a specific, individual hazard*. . . . As respondent's complaint alleges only that petitioner's train was traveling too quickly given the "time and place," app. 4, this case does not present, and we do not address, the questions of FRSA's pre-emptive effect on such related claims.

Id. at 675 n. 15 (emphasis added). Numerous plaintiffs since Easterwood have tried to rely on that footnote, and consequently, numerous courts have tried to define a "specific, individualized hazard."

The term does not include any condition at a railroad crossing that could have been taken into account when the Secretary of Transportation adopted related safety regulations. Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F. Supp. 1152, 1153 (W.D. Tex. 1994). It relates, instead, to the avoidance of a specific collision. Id. For example, "illegally and improperly parked tank cars" do not present a hazard which the Secretary took into consideration when determining train speed limits under the FRSA, and an engineer who fails to reduce his speed even though his vision of an upcoming crossing is obscured by that kind of hazard may be held liable. Missouri Pac. R.R. Co. v. Lemon, 861 S.W.2d 501, 509-10 (Tex. App. 1991). A child standing on a railway would also be the type of "discrete and truly local hazard" that the Secretary of Transportation "could not have practically considered when determining train speed limits under the FRSA." O'Bannon v. Union Pac. R.R. Co., 960 F.Supp. 1411, 1420 (W.D. Mo. 1997) (citing Bashir v. National R.R. Passenger

Corp., 929 F. Supp. 404, 412 (S.D. Fla. 1996), aff'd sub nom. Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997)).

By contrast, the lack of active warning devices, the steep grade and angle of a crossing, the proximity of the crossing to a highway, and overgrown vegetation adjacent to the railbed and near the railroad crossing are not the type of individualized local hazards that are incapable of being "adequately encompassed within uniform, national standards." O'Bannon, 960 F. Supp. at 1420-21, 1423 (citations omitted); see also Wright v. Illinois Cent. R.R. Co., 868 F. Supp. 183, 187 (S.D. Miss. 1994) (vegetation, inadequate warnings, grade and angle of crossing). Similarly, the mere presence of multiple tracks and rail cars that obstruct view is common at crossings and does not constitute a specific, individual hazard. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 888 (N.D. Ga. 1993). Lights from a nearby building which cause the train's headlight to disappear, thereby obscuring a motorist's depth perception, do not create a specific, individual hazard. Herriman v. Conrail Inc., 883 F. Supp. 303 (N.D. Ind. 1995). The Herriman court explained:

> The lighting condition at the crossing did not create a situation which existed solely on the night decedent was killed. Rather, these allegedly hazardous lights were continuously present at that crossing. Further, the duty the Herrimans seek to impose is not one that would require this particular engineer to slow down, but in fact would require a substantial reduction in speed by every Conrail train entering the Bond Avenue crossing at night. This generalized duty is distinguishable from the obvious case of an individual hazard -- i.e. an engineer who sees a motorist stranded on the crossing, but nevertheless negligently fails to stop or slow his train to avoid the collision.

Id. at 307.

Even a weather condition, such as snow, fog, or ice, fails to create a specific, individualized hazard because it creates a more generalized duty. See Cox v. Norfolk and Western Ry. Co., 998 F. Supp. 679, 685-87 (S.D.W. Va. 1998) (postulating that the Secretary of Transportation could have

taken into account less than perfect weather conditions when the Secretary set the operating speed limits); Stuckey v. Illinois Cent. R.R. Co., No. 2:96CV47-B-B, 1998 WL 97270 (N.D. Miss. Feb. 10, 1998) aff'd 162 F.3d 96 (5th Cir. 1998) (reasoning that the icy conditions were not limited to the subject crossing, but were prevalent throughout that part of the state on that date); Williams v. Alabama Great S. R.R. Co., Civ. A. No. 93-2117, 1994 WL 419863 (E.D. La. Aug. 8, 1994) (arguing that fog does not create a "specific, individualized hazard"); but see Bakhuyzen v. National Rail Passenger Corp., 20 F. Supp. 2d 1113, 1118 (W.D. Mich. 1996) (maintaining that weather conditions require independent responses from individual engineers, and weather conditions are not capable of being adequately encompassed within uniform national standards).

If part of the Bingham truck had crossed the tracks, it could be considered a "specific, individualized hazard." See Shaup v. Frederickson, No. CIV. A. 97-7260, 1998 WL 726650, at *11 (E.D. Pa. Oct. 16, 1998). However, the decision to operate a locomotive "nose-first" cannot be a "specific, individualized hazard" because it is does not represent a condition at the track at the time of the collision. It was a condition of the train. The parties have not made the Court aware of any regulation prohibiting a locomotive from being operated "nose-first" or any regulation requiring a slower speed when locomotives are operated "nose-first."

Similarly, the angle of the road and crossing cannot be considered a specific, individualized hazard; it is a condition of the track every day, and every train going along that stretch of track and every truck going across that crossing is aware of it. It is reasonable to presume that the Secretary of Transportation would have factored it into the determination of the FRA maximum track speed for that stretch of track. It is not something specific to the time of the collision at issue. See O'Bannon, 960 F. Supp. at 1420-21.

The trees and vegetation along the track are another matter. They do not fit within the "specific, individualized hazard" analysis, but within the analysis of whether Burlington fulfilled its obligation to control trees and vegetation so that drivers approaching the crossing could see the approaching train. Cf. O'Bannon, 960 F. Supp. at 1422-23. Federal law preempts state common law claims relating to a railroad's failure to trim vegetation immediately adjacent to the railbed (49 C.F.R. § 213.37(1990)); however, a railroad's failure to trim other vegetation in the right-of-way is not preempted. Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1554 (11th Cir. 1991), aff'd 507 U.S. 658 (1993) (citing Missouri Pac. R. R. Co. v. Railroad Comm'n, 833 F.2d 570, 577 (5th Cir. 1987)); see also O'Bannon, 960 F.Supp. at 1423-24; Bowman v. Norfolk Southern Railway Co., 832 F. Supp. 1014, 1021 (D.S.C. 1993), aff'd 66 F.3d 305 (4th Cir. 1995); Biggers, 820 F. Supp. at 1421; Fritzsche v. Union Pac. R.R. Co., No. 5-97-0323, 1999 WL 80926 (Ill. App. Ct. Feb. 19, 1999). Bingham and McMackin have raised a genuine issue of material fact as to Burlington's breach of its common law duty to clear other vegetation in the right-of-way.

In summary, Burlington and Davidson are entitled to partial summary judgment that a specific, individualized hazard is not created by "nose-first" operation of the locomotive, the angle of the road and crossing, and trees and vegetation immediately adjacent to the railbed. However, summary judgment is denied as to whether the train was traveling too fast given a specific, individualized hazard created by the alleged presence of the Bingham truck in the crossing or the alleged breach of Burlington's common law duty to clear other vegetation in the right-of-way.

**4. The Lookout**

To the extent that Bingham and McMackin contend that the train failed to keep a proper lookout for traffic at the crossing, they have presented sufficient evidence to show that a genuine

issue of material fact exists. That evidence includes conflicting testimony regarding the location of the truck when it was first observed by the train crew; evidence that the train was being operated "nose first," which possibly impaired the view of the train crew; and conflicting evidence as to whether, soon after the collision, a member of the train crew stated to McMackin, "I'm sorry I didn't see you. If I had seen anyone in the intersection, I would have been blowing the horn." (Resp. Br. filed in Case No. 97-CV-1026, at 19, incorporated into their Resp. Br. filed herein (Docket # 29)). It also includes conflicting testimony as to how far the train was from the point of impact when Davidson put the train into emergency mode. Compare Davidson Depo. at 97, attached to Combined Motion (Docket # 28) (300 feet), with Bakeman Affidavit, at 2, ¶ 8, attached as Ex. A to Response Brief (Docket # 29) (132 feet).

The issue of whether a train crew maintained a proper lookout is not appropriate for summary judgment when "conflicting evidence exists concerning when the conductors noticed the truck and how quickly the conductors reacted to it." Biggers v. Southern Ry. Co., 820 F. Supp. 1409, 1420 (N.D. Ga. 1993); see also Griffin v. Kansas City S. Ry. Co., 965 S.W.2d 458, 463 (Mo. Ct. App. 1998).[6] Burlington and Davidson are not entitled to summary judgment as a matter of law as to the actions of the train crew in keeping a proper lookout. Bingham and McMackin have shown more than some metaphysical doubt as to that issue, and the record, taken as a whole, could lead a rational trier of fact to find in their favor. See Matsushita., 475 U.S. at 586-87.

---

[6] Bingham and McMackin must still show that, if the train crew had maintained a proper lookout, the crew had sufficient time and distance to take effective action to avoid the collision. See Bryan v. Norfolk and Western Ry. Co., 154 F.3d 899, 902 (8th Cir. 1998), cert. dismissed, 119 S. Ct. 921 (1999); Woods v. Amtrak, 982 F. Supp. 409, 412-13 (N.D. Miss. 1997).

## CONCLUSION

The Combined Motion and Brief for Partial Summary Judgment (Docket # 28) is **GRANTED in part** and **DENIED in part**. Burlington and Davidson are entitled to summary judgment as to (1) the adequacy of the locomotive's warning devices; (2) any claim that the train was traveling in excess of the FRA track speed; (3) the actions of the train crew in slowing the train to avoid collision, given that "nose-first" operation of the locomotive, the angle of the road and crossing, and trees and vegetation immediately adjacent to the railbed do not constitute "specific, individualized hazards." They are **not** entitled to summary judgment as to (1) the actions of the train crew in sounding the train's whistle; (2) the inspection and operation of the independent brake on the locomotive; (3) the speed of the train given a specific, individualized hazard created by the alleged presence of the Bingham truck in the crossing or the alleged breach of Burlington's common law duty to clear other vegetation in the right-of-way; and (4) the actions of the train crew in keeping a proper lookout.

**DATED** this 1st day of April, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

APR 1999

U.S. DISTRICT COURT

CLARENCE EDWARD JACKSON,

Plaintiff,

vs.

MARVIN T. RUNYON, POSTMASTER GENERAL OF THE UNITED STATES,

Defendant.

No. 98 CV 00038 BU (J)

ENTERED ON DOCKET
DATE APR 2 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints and causes of action of any type by either party against the other party. Each party shall bear his or its own costs, expenses, and attorney fees without assessment against the other party.

Executed the respective dates shown adjacent to each signature.

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, P.L.L.C. - OBA #36

4-2-99
Date

JO ANNE DEATON (#5938)
100 W. Fifth Street, Suite 400
ONEOK Plaza
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173 FAX (918) 592-3390
Attorneys for Plaintiff, Clarence Edward Jackson

STEPHEN C. LEWIS
ASSISTANT U.S. ATTORNEY

4-2-99
Date

PHIL PINNELL
333 W. Fourth, Room 3460
Tulsa, Oklahoma 74103
581-7463
Attorney for Defendant, Marvin T. Runyon

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA



TULSA RIG IRON, INC.,

Plaintiff,

v.

OZZIE'S PADDER OF NORTH AMERICA, INC. a/k/a or d/b/a OZZIE'S DIRECTIONAL DRILLING, and OZZIE'S PIPELINE PADDER, INC.,

Defendants.

Case No. 98 CV-0847H (M)



**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, Tulsa Rig Iron, Inc., and Defendants, Ozzie's Padder of North America Inc. and Ozzie's Pipeline Padder, Inc., pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and hereby dismiss by joint stipulation the above styled and numbered cause **with prejudice**. The parties advise the Court that all claims and counterclaims alleged in this lawsuit have been resolved through a mutually agreeable settlement.

It has further been agreed that each party will bear their own attorney fees and costs.

Dated this 30th day of March, 1999.

Chris S. Thrutchley, Esq.
Woodstock, McKee, McArtor & Thrutchley
1518 South Cheyenne
Tulsa, Oklahoma 74119
918/583-1511
918/583-2099 (Fax)
and
E. Scott Pruitt, Esq.
15 West Sixth Street, Suite 1302
Tulsa, Oklahoma 74119
918/583-7799
918/583-7822 (Fax)
Attorneys for Plaintiff

Patrick H. Kernan
Kris Ted Ledford
McKINNEY & STRINGER, P.C.
401 South Boston, Suite 2100
Tulsa, Oklahoma 74103
918/582-3176
918/582-1403 (Fax)
Attorneys for Defendants

## CERTIFICATE OF SERVICE

This is to certify that on the 30th day of March, 1999, a true and correct copy of the above and foregoing Joint Stipulation of Dismissal With Prejudice was mailed, postage pre-paid to:

Patrick H. Kernan
Kris Ted Ledford
McKINNEY & STRINGER, P.C.
401 South Boston, Suite 2100
Tulsa, Oklahoma 74103

Attorneys for Defendants

Chris S. Thrutchley

KTL/30876.001/10024138.1

FILED

APR 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT STATE OF OKLAHOMA

| | | |
|---|---|---|
| DOLPHIN MANUFACTURING COMPANY, INC., an Oklahoma corporation, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Case No. 99CV0194E (J) |
| MOVIES & GAMES 4 SALE, L.P., a Delaware limited partnership, and GAMES TRADER, INC., a Canadian corporation, | ) | |
| Defendants. | ) | |

ENTERED ON DOCKET
DATE APR 02 1999

**JUDGMENT**

NOW, on this 30th day of March, 1999, the above-styled and numbered case comes on pursuant to Plaintiff's Motion for Preliminary Injunction and for hearing on the merits on Plaintiff's First Claim for Relief against Movies & Games 4 Sale, L.P.

Plaintiff appears by and through its attorneys for record, KIVELL, RAYMENT AND FRANCIS by Brian J. Rayment. Defendant Movies & Games 4 Sale, L.P. appears by and through its attorneys of record, GARDERE & WYNNE, L.L.P. by Jeffrey E. Carlson.

The Court, upon hearing the testimony of the witnesses and stipulations of counsel, finds and orders as follows:

1. This Court has jurisdiction over the subject matter hereof and the parties hereto.

2. The parties have stipulated that the Defendant Movies & Games 4 Sale, L.P., is justly indebted to the Plaintiff in the principal sum of $313,782.98; that the Court may direct the entry

of a final judgment against the Defendant Movies & Games 4 Sale, L.P., as there is no just reason for delaying the entry of judgment; and that the parties waive the ten day stay of execution upon this judgment pursuant to Rule 62 of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Dolphin Manufacturing Company, Inc., have and recover judgment against the Defendant Movies & Games 4 Sale, L.P. in the principal sum of $313,782.98, together with interest at the statutory rate per annum from the effective date of this judgment, April 30, 1999, plus costs and any reasonable attorneys' fees as may be subsequently awarded by the Court.

IT IS FURTHER ORDERED that there is no just reason for delaying the entry of a final judgment herein against the Defendant Movies & Games 4 Sale, L.P., and the Clerk of the Court is directed to enter this judgment as a final judgment against the Defendant Movies & Games 4 Sale, L.P.

IT IS FURTHER ORDERED that Plaintiff may immediately proceed with execution upon this judgment without regard to the ten delay set forth in Rule 62 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Defendant Movies & Games 4 Sale, L.P., has represented to the Court that it is a Delaware limited partnership. Accordingly, the pleadings and designation of Defendant Movies & Games 4 Sale, L.P., is hereby amended to reflect that said Defendant is a Delaware limited partnership.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction is denied. However, Plaintiff shall be free to submit its Motion for injunction pursuant to Rule 64 of the Federal Rules of Civil Proceedure.

IT IS FURTHER ORDERED that Plaintiff's $10,000.00 bond is hereby released. UPON PROPER APPLICATION. JSE

IT IS FURTHER ORDERED that Plaintiff's claims against the Defendant, Games Trader, Inc., are not resolved by virtue of this judgment and are specifically reserved for later determination by the Court.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approval as to form:

BRIAN J. RAYMENT, OBA #7441
KIVELL, RAYMENT AND FRANCIS
7666 East 61st Street, Suite 240
Tulsa, OK 74133
(918) 254-0626
Attorneys for Plaintiff
Dolphin Manufacturing Company, Inc.

See attached

JEFFERY E. CARLSON, OBA #14691
GARDERE & WYNNE, L.L.P.
100 West 5th Street, Suite 200
Tulsa, OK 74103-4240
(918) 699-2900
Attorneys for Defendant
Movies & Games 4 Sale, L.P.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction is denied. However, Plaintiff shall be free to submit its Motion for injunction pursuant to Rule 64 of the Federal Rules of Civil Proceedure.

IT IS FURTHER ORDERED that Plaintiff's $10,000.00 bond is hereby released.

IT IS FURTHER ORDERED that Plaintiff's claims against the Defendant, Games Trader, Inc., are not resolved by virtue of this judgment and are specifically reserved for later determination by the Court.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approval as to form:

BRIAN J. RAYMENT, OBA #7441
KIVELL, RAYMENT AND FRANCIS
7666 East 61st Street, Suite 240
Tulsa, OK 74133
(918) 254-0626
Attorneys for Plaintiff
Dolphin Manufacturing Company, Inc.

JEFFERY E. CARLSON, OBA #14691
GARDERE & WYNNE, L.L.P.
100 West 5th Street, Suite 200
Tulsa, OK 74103-4240
(918) 699-2900
Attorneys for Defendant
Movies & Games 4 Sale, L.P.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
APR 01 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAYNE L. REED,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 98-CV-109-H

ENTERED ON DOCKET
DATE APR - 2 1999

## STIPULATION OF DISMISSAL

Plaintiff, Jayne L. Reed, by her attorney of record, J.L. Franks and the defendant, United States of America, acting on behalf of the United States Postal Service, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation hereby stipulates to, and requests entry by the court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 1st day of April, 1999.

CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West 4th Street
Tulsa, OK 74103
(918) 581-7463
Attorney for the Defendant

J.L. FRANKS, OBA #13592
Attorney at Law
P. O. Box 799
Tulsa, OK 74101
(918) 584-4724
Attorney for Plaintiff

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



BRENDA K. DEMAUO,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 98-CV-644-J



**JUDGMENT**

This action has come before the Court for consideration and an Order remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 31st day of March 1999.

Sam A. Joyner
United States Magistrate Judge

FILED

MAR 31 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**RONNIE DEAN ROUTH,**

**Plaintiff,**

**-vs-**

**AMERICAN STATES INSURANCE,**

**Defendant.**

**Case No. 98-CV-0564H(E)**

ENTERED ON DOCKET

DATE APR 1 1999

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

**COME NOW** Plaintiff, RONNIE DEAN ROUTH, by and through his attorney, Kort A. BeSore, of the law firm of BeSore & Hunt, and Defendant, AMERICAN STATES INSURANCE, by and through its attorney, James K. Secrest, II, of the law firm of Secrest, Hill & Folluo, and hereby jointly stipulate to the dismissal with prejudice of the above-styled and numbered action, in its entirety.

DATED this 29 day of MARCH, 1999.

KORT A. BESORE, O.B.A. #14674
ATTORNEY FOR PLAINTIFF

JAMES K. SECREST, II, O.B.A. #8049
ATTORNEY FOR DEFENDANT

mail CD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| DENISE McMANIS,<br><br>Plaintiff,<br><br>v.<br><br>APACHE METAL SALES, INC., WORD INDUSTRIES FABRICATORS, INC.; WORD INDUSTRIES PIPE FABRICATING, INC., WORD INDUSTRIES, INC., and JOHN HALLFORD,<br><br>Defendants. | ) | Case No. 98-CV-0345-H(J) |



**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff Denise McManis and Defendants Word Industries Fabricators, Inc., Word Industries, Inc., Word Industries Pipe Fabricating, Inc., Apache Metal Sales, Inc., and John Hallford hereby dismiss the above lawsuit with prejudice pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure.

Jack W. Ross
Jack W. Ross & Associates
106 North Main Street
Broken Arrow, OK 74012-3937

Richard A. Paschal
2727 East 21st Street, Suite 103
Tulsa, OK 74113-3523

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| DENISE McMANIS, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. 98-CV-0345-H(J) |
| | ) | |
| APACHE METAL SALES, INC., WORD INDUSTRIES FABRICATORS, INC.; WORD INDUSTRIES PIPE FABRICATING, INC., WORD INDUSTRIES, INC., and JOHN HALLFORD, | ) | |
| | ) | |
| Defendants. | ) | |

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff Denise McManis and Defendants Word Industries Fabricators, Inc., Word Industries, Inc., Word Industries Pipe Fabricating, Inc., Apache Metal Sales, Inc., and John Hallford hereby dismiss the above lawsuit with prejudice pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure.

Jack W. Ross
Jack W. Ross & Associates
106 North Main Street
Broken Arrow, OK 74012-3937

Richard A. Paschal
Richard A. Paschal
2727 East 21st Street, Suite 103
Tulsa, OK 74113-3523

Attorneys for Plaintiff

Jo Anne Deaton
Rhodes, Hieronymus, Jones, Tucker & Gable
100 W. Fifth, Suite 400
P.O. Box 21100
Tulsa, OK 74121

Attorneys for Word Industries Fabricators, Inc.

Everett Bennett
Frasier, Frasier & Hickman
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101

Attorneys for John Hallford

Michael C. Redman
Doerner, Saunders, Daniel & Anderson
320 S. Boston Ave., Suite 500
Tulsa, OK 74103
(918) 582-1211

Attorneys for Word Industries, Inc.,
Apache Metal Sales, Inc., Word Industries
Pipe Fabricating, Inc.

Jo Anne Deaton
Rhodes, Hieronymus, Jones, Tucker & Gable
100 West Fifth, Ste. 400
Tulsa, Oklahoma 74103

Attorneys for Word Industry Fabricators, Inc.

Everett Bennett
Frasier, Frasier & Hickman
1700 Southwest Boulevard
P.O. 799
Tulsa, Oklahoma 74101

Attorneys for John Hallford

Michael C. Redman
Doerner, Saunders, Daniel & Anderson
320 S. Boston Ave., Suite 500
Tulsa, OK 74103
(918) 582-1211

Attorneys for Word Industries, Inc.,
Apache Metal Sales, Inc., Word Industries
Pipe Fabricating, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



**BRENDA K. DEMAURO,**

**Plaintiff,**

**v.**

**KENNETH S. APFEL, Commissioner of the Social Security Administration,**

**Defendant.**

Case No. 98-CV-644-J



## ORDER

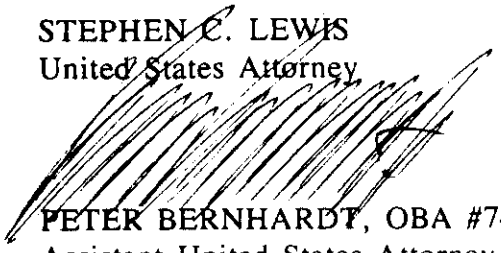
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act. 42 U.S.C. 405(g).

DATED this 30 day of MARCH 1999.

SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 1 1999

RODNEY KEITH DICK,

Plaintiff,

vs.

LARRY FIELDS, DAVID MILLER, JOHN MIDDLETON, HOWARD RAY, TROY ALEXANDER, and JOHN DOE,

Defendants.

No. 96-CV-1178-K

FILED
MAR 30 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court upon Defendants' motion for summary judgment. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants and against Plaintiff and that Plaintiff take nothing by his claims.

SO ORDERED THIS 30 day of March, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| RODNEY KEITH DICK, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 96-CV-1178-K |
| | ) | |
| LARRY FIELDS, DAVID MILLER, JOHN MIDDLETON, HOWARD RAY, TROY ALEXANDER, and JOHN DOE, | ) | |
| | ) | |
| Defendants. | ) | |



**ORDER**

Plaintiff, a state prisoner initially appearing *pro se* but currently represented by counsel, paid the filing fee to commence this 42 U.S.C. § 1983 civil rights action. Plaintiff alleges that in December, 1994, Defendants were deliberately indifferent to his safety in violation of the Eighth and Fourteenth Amendments when he was exposed to asbestos while renovating a Department of Corrections ("DOC") building located at the Northeast Oklahoma Correctional Center ("NOCC"), Vinita, Oklahoma. Plaintiff also claims he has received inadequate medical care in violation of the Eighth Amendment and that Defendants violated his rights to due process and equal protection. Pursuant to the Court's Order entered September 2, 1997 (#14), all claims against Defendants in their official capacities were dismissed based on Eleventh Amendment immunity. In addition, Defendants' motion to dismiss based on exhaustion of administrative remedies, the statute of limitations, and qualified immunity was denied. Defendants were directed to prepare a special report to be submitted along with their answer and/or dispositive motion.

In compliance with the September 2, 1997 Order, Defendants have moved to dismiss, or in

the alternative, for summary judgment (#17). Defendants have also submitted the court-ordered special report (#18). See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has responded to Defendants' motion (#22). Defendants have replied to Plaintiff's response (#23). For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted as to Plaintiff's due process/equal protection claim and the motion for summary judgment should be granted as to Plaintiff's Eighth Amendment claims.

## *BACKGROUND AND PROCEDURAL HISTORY*

Based on the statements of fact and the record provided by the parties, the Court finds that the following facts are undisputed:

1. Plaintiff was received by DOC on December 14, 1993. He was transferred to the NOCC on December 14, 1994.
2. While incarcerated at NOCC, Plaintiff was assigned to Building 14 where he provided labor in the renovation of the building.
3. Building 14 housing unit was constructed circa 1951, as part of Eastern State Hospital. DOC assumed control of Building 14 in 1994.
4. Prior to 1991, NOCC's Building 14 contained asbestos. To remove the asbestos, abatement procedures were conducted in October, 1991. Thereafter, air samples taken in Building 14 demonstrated that the level of asbestos was "below detection limit" or "clean." (#18, Attachment I ).
5. Further abatement was conducted in October, 1994, two months prior to Plaintiff's arrival at NOCC. This secondary abatement was conducted to remove additional asbestos located

in the light fixtures. On October 27, 1991, after the abatement procedures were completed, air samples were taken in Building 14 and again the level of airborne asbestos was "well below the State of Oklahoma clearance standard of 0.01 f/cc (UCL)." (#18, Attachment J).

6. During the December, 1994, renovation, dust attributable to the work accumulated in Building 14.

7. Plaintiff complained to NOCC officials about the work conditions and requested a transfer to a different DOC facility.

8. Nine (9) days after his arrival at NOCC, on December 23, 1994, Plaintiff was transferred to Jess Dunn Correctional Center ("JDCC").

9. Plaintiff filed his "opening statement" to the instant civil rights complaint on December 23, 1996 (#1).

10. Plaintiff first complained of asbestos related health problems to DOC medical staff in May, 1997, approximately 2 ½ years after the alleged exposure and 6 months after the filing of the instant lawsuit. At that time, Plaintiff received treatment for "irritative bronchitis." (#18, Attachment C, p. 11 of 13).

## *ANALYSIS*

### A. Applicable Standards

#### *1. Summary Judgment Standard*

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints,

not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. *Standard for Dismissal for Failure to State a Claim*

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be

presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

*3. Standards for establishing Eighth Amendment violations*

The requirements for proving an actionable violation of the Eighth Amendment are well established. First, an inmate must demonstrate that the deprivation suffered was "objectively, 'sufficiently serious.'" Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the inmate must establish that prison officials had a "sufficiently culpable state of mind" in allowing the deprivation to take place. Id. (quoting Wilson, 501 U.S. at 302-303). This second prong of the test has been defined as being "deliberately indifferent" to an inmate's health or safety. Id.

A plaintiff's claim that he was denied adequate medical care must be judged against the "deliberate indifference to serious medical needs" test as set out in Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin v. Bd. of County Comm'rs, 909 F.2d 402, 406 (10th Cir. 1990). That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson, 501 U.S. at 298-99. Neither negligence nor gross negligence satisfies the deliberate indifference standard required for a violation of the Eighth Amendment.

Estelle, 429 U.S. at 104-05; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980).

**B. Plaintiff fails to establish Eighth Amendment violations**

*1. Plaintiff has failed to establish that his alleged exposure to asbestos was in violation of the Eighth Amendment*

Asbestos is a well-known and highly publicized carcinogen. See, e.g., 20 U.S.C. §§ 3601(a)(3), 4011(a)(3) (noting the Congressional finding that medical science has not established any minimum level of exposure to asbestos considered safe). Any exposure to asbestos would be "objectively, sufficiently serious" to satisfy the first prong of Farmer. Thus, in the instant case, an actionable violation of the Eighth Amendment occurred if Plaintiff demonstrates that Defendants knew there was asbestos in Building 14 and required him to work in the building despite their knowledge of a substantial risk of harm. Farmer, 511 U.S. at 834. As discussed below, Plaintiff has failed to present competent evidence that, in December, 1994, Defendants knew there was asbestos in Building 14 and required him to work in the building despite their knowledge.

The question of a prison official's knowledge is a question of fact, "subject to demonstration in the usual ways, including inference from circumstantial evidence." Id. Plaintiff claims that when he walked into Building 14, upon his arrival at NOCC, he observed a black and yellow warning ribbon as well as signs warning of the presence of asbestos. Plaintiff attaches his own affidavit (#22, Attachment 2) as well as an affidavit from fellow inmate, Carl Edward Simmons (#22, Attachment 1), to support these claims. Plaintiff also provides a written announcement directed to "individuals exposed to asbestos" (#22, Attachment 5) which he claims he removed from Building 14 while he was housed there.

As part of the Special Report submitted pursuant to the Court's Order entered September 2, 1997, Defendants provide the affidavits of Sgt. Bennefield (#18, Attachment F), the DOC employee who transported Plaintiff to NOCC in December, 1994, and Defendant Troy Alexander (#18, Attachment G), the NOCC Unit Manager in December, 1994. Neither Bennefield nor Alexander recalls seeing yellow and black warning tape or signs indicating the building had been condemned. Therefore, a factual dispute clearly exists as to the presence or absence of warning tape and signs in December, 1994. However, the Court finds the existence of this factual dispute is not material to resolution of Plaintiff's Eighth Amendment claims.

The affidavits and other materials provided by Defendants as part of the Special Report and in support of their motion for summary judgment indicate that Building 14 had undergone two rounds of asbestos abatement procedures prior to Plaintiff's December, 1994 occupancy of the building. On November 22, 1991, after the first round of abatement procedures, Bob Patton, Inspector for the State of Oklahoma, Department of Labor, Asbestos Division, wrote to the Business Manager of Eastern State Hospital informing her that the attic area of Building 14 had been cleaned of asbestos and that "the air in this area has been checked on several occasion's (sic) and each time has come back as Below Detection Limit. In layman terms, this just means the air is clean." (#18, Attachment I at 1). The Consultation Reports signed by inspectors for the Oklahoma State Department of Labor during the abatement process repeatedly indicate that Eastern State Hospital's representative accepted the "visual inspection." (#18, Attachment I at 3-8). Defendants also provide documentation demonstrating that air quality tests conducted on October 27, 1994, after the completion of secondary abatement procedures, showed "airborne fiber concentrations to be well below the State of Oklahoma clearance standard of 0.01 f/cc

(UCL)." (#18, Attachment J). James Kennedy, employed by DOC as the project manager for the construction and renovation projects at NOCC in December, 1994, states in his affidavit that "[t]he Department of Labor and the Occupational Safety Health Administration have set the standard that an air sample cannot exceed 0.01 fiber concentration per cubic centimeter and be safe. Anything below 0.01 f/cc is considered safe. According to the report by Mr. Gaylor [an industrial hygienist for the Department of Central Services, State of Oklahoma] the air samples were below 0.01 f/cc, and therefore, safe." (#18, Attachment H).

Although Plaintiff provides no evidence to controvert the air quality test results submitted by Defendants, Plaintiff includes, in his response in opposition to the motion for summary judgment, his own affidavit as well as affidavits of fellow inmates to support his contention that "Defendants were well aware of the presence of asbestos that was or could become friable at NOCC." (#22 at 5). However, much of the evidence provided by Plaintiff cannot be considered competent evidence for purposes of opposing a Rule 56 motion for summary judgment. Inmate Carl Edward Simmons states that John Spergen, a maintenance worker employed by DOC, told him that the inmates "were being exposed to asbestos." (#22, Attachment No. 1). Similarly, inmate John W. Miller states he was told by other inmates that the attic tested "HOT" for asbestos. (#22, Attachment 7). However, as pointed out by Defendants in their reply to Plaintiff's response to the motion for summary judgment, that evidence constitutes inadmissible hearsay and fails to satisfy the showing required under Fed. R. Civ. P. 56(e) (providing that "opposing affidavits set forth such facts as would be admissible in evidence").

Inmate Simmons also states that he had to work "in attic spaces that contained asbestos, building #14 being one of the attics." (#22, Attachment No. 1). In addition, inmate Michael

Edward Akin provides an Affidavit stating that sometime after July 1995, he "hauled truck load after truck load of asbestos contaminated material from building #14." (#22, Attachment No. 4). Plaintiff also attaches affidavits of inmates Ronald Lee Fordyce (#22, Attachment 6) and John W. Miller (#22, Attachment 7) who state that while installing fiberglass insulation in Building 14's attic in October and November, 1996, they were issued protective suits and face masks. Inmate Fordyce states that based on his experience working with asbestos acquired while he was a plumber in the United States Air Force, "the attic of bldg. #4 [also known as #14] was full of dust and debris, including asbestos dust as well."

Significantly, inmates Simmons and Akin fail to provide any basis for their ability to identify the material from Building #14 as containing asbestos. In contrast, inmate Ronald Lee Fordyce does provide a possible basis for being able to recognize asbestos fibers, i.e., his experience as a plumber in the U.S. Air Force. However, given the existence of records reflecting the State's successful abatement of asbestos only six weeks prior to Plaintiff's arrival at NOCC, the Court finds that inmate Fordyce's observations, made almost two (2) years after Plaintiff worked in Building 14, do not provide a basis for concluding that Defendants knew of the alleged presence of asbestos in Building 14 in December, 1994, and required Plaintiff to work there in spite of their knowledge.

Plaintiff also claims that he removed 2 ½ lbs. of dust and debris from Building 14 prior to his transfer to JDCC. (#22, Attachment 2 at 2). According to Plaintiff's affidavit and the affidavit submitted by fellow inmate Bruce Wayne Martin (#22, Attachment 3), JDCC officials removed the bag allegedly containing asbestos from Plaintiff's possession on September 26, 1997. Defendants admit that the material confiscated from Plaintiff is currently being held in the

Contraband Room at JDCC. (#23 at 1). However, Defendants further state that "when Plaintiff was transferred to JDCC from NOCC, his property was routinely inventoried and he did not have a bag of asbestos or dust in his possession." (#23 at 1). Defendants have also provided the DOC Inmate Personal Property Inventory Form completed by a JDCC official on December 28, 1994 upon Plaintiff's arrival from NOCC (#23, Ex. A). The inventory form does not identify a 2 ½ lb bag of dust and debris as having been in Plaintiff's possession. Thus, Defendants argue that there is no evidence that Plaintiff obtained the alleged asbestos materials while incarcerated at NOCC. Plaintiff urges, however, that the material must be returned to him and tested for the presence of asbestos.

The Court finds that even if it could be determined that the material came from Building 14 during the period of time Plaintiff was housed there and test results show the material contained asbestos, that evidence alone would not establish that these Defendants knew asbestos was present in Building 14 and nonetheless required Plaintiff to work there. In other words, the factual dispute over the contents of the bag is not material to establishing that Defendants had a "sufficiently culpable state of mind" in allowing the alleged exposure to take place. See Farmer, 511 U.S. at 834.

Thus, although it is established that Building 14 had a history of asbestos contamination and abatement, tests conducted approximately six (6) weeks before Plaintiff's arrival at NOCC showed airborne asbestos fiber concentrations to be below the threshold level. Furthermore, following completion of the primary abatement in 1991, visual inspections by state officials were accepted by the owner of the building. Therefore, assuming *arguendo* that Plaintiff was exposed to asbestos during his occupancy of Building 14, Defendants, all DOC employees, had no reason

to suspect, based on the results of tests conducted by the State of Oklahoma, Department of Central Services, that inmates, including Plaintiff, assigned to work on the renovation of Building 14 in December, 1994, would be exposed to airborne asbestos. The Court concludes that Plaintiff has failed to establish that Defendants intentionally allowed him to be exposed to asbestos. Stated in Eighth Amendment terminology, Plaintiff has failed to establish that any of the Defendants had a "sufficiently culpable state of mind" in allowing the alleged exposure to take place. As a result, Plaintiff has failed to establish an Eighth Amendment violation and Defendants are entitled to judgment as a matter of law on Plaintiff's claim that he was exposed to asbestos in violation of the Eighth Amendment.

2. *Plaintiff has failed to establish that he was denied medical care in violation of the Eighth Amendment*

Defendants also argue that Plaintiff has failed to establish that he has been provided inadequate medical care in violation of the Eighth Amendment. The Court agrees. As an initial matter, the Court notes Plaintiff states in his "opening statement" that "[a]t all times relevant to this complaint, Dick was incarcerated at [NOCC] located in Vinita, Oklahoma." (#1 at 2). In addition, each defendant is sued based on his role in the incidents alleged to have occurred at NOCC. Plaintiff has not alleged that any of the named defendants participated in any provision or denial of medical care at JDCC where Plaintiff has been incarcerated since his transfer from NOCC. Therefore, Plaintiff's claim of inadequate medical care is limited, by the terms of the complaint, to the time he was incarcerated at NOCC.

Although Plaintiff states in his Affidavit provided in support of his response to

Defendants' motion for summary judgment that no medical care was available at NOCC (#22, Attachment 2), he does not allege that he requested and was denied medical care during his nine-day stay at that facility. Nor does he provide any evidence that he suffered from a "serious medical need" during his stay at NOCC to which NOCC officials were "deliberately indifferent." In his affidavit, Plaintiff states that he directed both verbal and written requests to the Unit Manager, [Defendant] Alexander, that he either "be returned to the Jess Dunn facility and/or otherwise transferred to another DOC facility. My concern(s) stemmed from the fact that during my confinement and stay within housing unit-Building #14 at the NOCC facility I increasingly experienced breathing problems, would awaken each and ever (sic) morning caked with a fine powder of this contaminated dust and debris, was experiencing headaches and nausea as well as emotional distress and anxiety." (#22, Attachment 2 at 2). However, NOCC officials complied with Plaintiff's request and transferred him back to JDCC after only nine (9) days at NOCC. The Court concludes that no genuine issue of material fact exists as to any alleged denial of medical care by the Defendants named in this case.

Furthermore, it would be futile to allow Plaintiff to amend his complaint to name additional defendants because any claim of inadequate medical care, necessitated by his alleged exposure to asbestos at NOCC, by the medical staff at JDCC, would also fail. The records provided by Defendants reveal that after his stay at NOCC in December of 1994, Plaintiff was not seen by JDCC medical personnel until June, 1995, when he complained of a wart on his right middle finger (#18, Attachment C at 10). Plaintiff did not report any asbestos related health problems to JDCC medical staff until the spring of 1997, approximately 2 ½ years after the alleged exposure and 6 months after the filing of the instant lawsuit. Plaintiff's medical records

demonstrate that at that time, Plaintiff's temperature was 98.2 and he complained of "coughing -- was yellowish-green now white, throat sore, hard to draw in deep breaths." He also informed the medical personnel that in 12/94, he "was exposed to asbestos for 9 days without protection -- has gotten better but has flare ups." The physical exam revealed "throat clear, lungs clear, breath sounds throughout, Chest x-ray -- chronic bronchial markings with small calcif's compatible with smoker's lung." The impression was "irritative bronchitis" and the recommendation was an antibiotic, no cigarettes for 2 weeks and to increase water intake. (#18, attachment C, p. 11 of 13).

Plaintiff claims that this record is sufficient to indicate he was provided with, at best, indifferent medical care in violation of the Eighth Amendment. See #22 at 5-6. The Court disagrees. The records indicate Plaintiff has received medical treatment when requested. Although Plaintiff may disagree with the treatment provided, that disagreement does not provide the basis for an Eighth Amendment violation. Plaintiff has provided no evidence that he was refused treatment or that he was denied access to medical personnel capable of treating his problems. The Court finds that even though Plaintiff may have wanted different care or medication, Plaintiff's "disagreement about medical treatment" claim does not rise to the level of constitutional violation cognizable under § 1983. Estelle, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth [Fourteenth] Amendment . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) ("At most, plaintiff differs with the medical judgment of the prison doctor . . . Such a difference of opinion does not support a claim of cruel

and unusual punishment."); Alston v. Howard, 925 F.Supp. 1034, 1040 (S.D. N.Y. 1996) ("[D]isagreement as to the appropriate course of treatment [does not] create a constitutional claim.") (citation omitted). Nor does a delay in providing care to an inmate constitute cruel and unusual punishment unless there has been deliberate indifference resulting in substantial harm. Id. at 1476-77. See also Hyde v. McGinnis, 429 F.2d 864, 867-68 (2d Cir. 1970) (explaining that prisoner's disagreement over doctor's failure to prescribe a pill version of tranquilizer was a matter of medical judgment and did not state a claim under § 1983).

For the reasons discussed above, the Court finds Defendants are entitled to judgment as a matter of law on Plaintiff's claim of denial of medical care in violation of the Eighth Amendment.

**C. Plaintiff has failed to articulate a due process/equal protection claim**

In his "opening statement," Plaintiff identifies as his second cause of action that he "was denied the Due Process and Equal Protection of the law where the Defendant's (sic) purposefully, with malice and forethought failed to warn the Plaintiff and issue proper safety gear in the removal of friable asbestos in Building 14 of NOCC." (#1 at 10). However, Plaintiff completely fails to identify how the alleged conduct of Defendants constituted due process and equal protection violations. Although *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally, Haines v. Kerner, 404 U.S. 519, 520 (1972), nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

To the extent Plaintiff asserts his claim arises under the Fourteenth Amendment's due process clause, his claim fails. The Fourteenth Amendment affords no greater protection than the Eighth Amendment for an inmate alleging unlawful infliction of pain or punishment. See Whitley v. Albers, 475 U.S. 312 (1986); Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). In Whitley, the Supreme Court stated as follows:

> We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. . . . [T]he Due process Clause affords respondent no greater protection than does the Cruel and Unusual Punishment Clause.

Id. at 327. Two Circuit Courts have also held that a convicted prisoner's section 1983 claim for excessive use of force must be analyzed under the Eighth Amendment, and not under principles of substantive due process. See Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994); Walker v. Norris, 917 F.2d 1449, 1455 (6th Cir. 1990). Under the above authority, the Court must conclude that Plaintiff's instant claims arise under the Eighth Amendment, and not under substantive due process theories. His substantive due process claim should therefore be dismissed. Cf. Abeyta v.Chama Valley Indep. Sch. Dist., No. 19, 77 F.3d 1253 (10th Cir. 1996).

As to Plaintiff's claim that Defendants' actions violated the equal protection clause, the Court concludes that the Plaintiff has neither alleged nor established that the Defendants intentionally or purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff has failed to articulate how

the equal protection clause applies to the facts alleged in this case. Accordingly, Plaintiff's equal protection claim should be dismissed for failure to state a claim upon which relief may be granted.

## *CONCLUSION*

After liberally construing Plaintiff's complaint, the Court concludes that Defendants' motion to dismiss for failure to state a claim should be granted with regard to Plaintiff's due process/equal protection claim. As to Defendants' motion for summary judgment, the Court concludes Defendants are entitled to judgment as a matter of law on Plaintiff's claim that he was exposed to asbestos in violation of the Eighth Amendment and that he received inadequate medical care in violation of the Eighth Amendment.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

(1) Defendant's motion to dismiss for failure to state a claim (# 17-1) is **granted** as to Plaintiff's due process/equal protection claim and **denied** in all other respects.

(2) Defendant's motion for summary judgment (# 17-2) is **granted** as to Plaintiff's claims that he was exposed asbestos in violation of the Eighth Amendment and that he received inadequate medical care in violation of the Eighth Amendment.

(3) This Order constitutes a final Order in this case dispositive of all claims.

SO ORDERED THIS 30 day of March, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANICE DOE, by Next Friend Sally Doe; SALLY DOE and SAM DOE, as parents of Janice Doe,

Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT NO. 9 OF TULSA COUNTY, OKLAHOMA (UNION PUBLIC SCHOOLS),

Defendant.

ENTERED ON DOCKET

DATE APR - 1 1999

Case No. 96-CV-613-H

FILED

MAR 31 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Independent School District No. 9 of Tulsa County, Oklahoma's (hereinafter "Union" or "School District") Motion for Summary Judgment and Statement of Material Facts and Brief in Support filed July 23, 1998 (Docket # 58). Having considered the original and supplemental submissions of the parties, for the reasons expressed herein the Court concludes that summary judgment should be granted.

I

For purposes of the instant motion, the Court accepts as undisputed the findings of fact and conclusions of law set forth in this Court's order dated May 5, 1998. In addition, the parties have set forth the following facts in their submissions to the Court, and the Court accepts them as undisputed.

1. On May 25, 1995, Dr. Bonnie Johnson of the Union Public School District sent a letter to Sally Doe indicating that the School District would cease funding Janice Doe's private school education. Dr. Johnson did not consult an IEP team or reevaluate Janice Doe

40

before making that decision. The School District did not pay for tuition or for related services for Janice Doe during the summer of 1995 or during the 1995-1996 school year.

2. On July 5, 1996, Janice Doe by Next Friend Sally Doe, Sally Doe, and Sam Doe filed suit against Union School District, alleging, inter alia, violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983, and seeking preliminary injunctive relief against Union.

3. On August 8, 1996, the Court issued an order granting Plaintiffs' request for a preliminary injunction, and on August 22, 1996, the Court stayed consideration of the remaining issues in the case until pending administrative hearings commenced pursuant to the IDEA had concluded.

4. Janice Doe's mother Sally Doe and her counsel attended the May 13, 1997 IEP meeting. At the conclusion of that meeting, Plaintiffs' counsel advised the School District that Plaintiffs' objections to the IEP would be presented in the form of a letter to the School District. At the conclusion of the meeting Sally Doe did not sign the IEP, and neither Sally Doe nor Plaintiffs' counsel objected to the exclusion of tutoring as a related service in the May 13, 1997 IEP at that time.

5. Following the conclusion of the IDEA administrative hearings, on June 27, 1997, Plaintiffs filed a First Amended Complaint in case number 97-CV-610-H. The First Amended Complaint is divided into four Counts. Count I seeks injunctive and other relief under the IDEA. Count II asserts claims under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Americans With Disabilities Act, 42 U.S.C. § 12132, and also

asserts a claim of unlawful retaliation against Plaintiffs for their assertion of rights secured under those statutes. Count III contains claims based on 42 U.S.C. § 1983 for violations of the IDEA as well as infringement of substantive and procedural due process rights secured by the Fifth and Fourteenth Amendments of the Constitution. Count IV seeks judicial review of the administrative hearings granted under the IDEA. The Court consolidated 97-CV-610-H and this case by minute order dated September 15, 1997.

6. By minute order dated November 13, 1997, the Court bifurcated the trial of the issues presented in the First Amended Complaint, and pursuant to that order the parties presented evidence on the issues of the appeal of the administrative decision in the due process hearings conducted by the Oklahoma State Department of Education, the continuation of stay put requirements pursuant to 20 U.S.C. § 1415(j), and all claims for injunctive relief sought by Plaintiffs.

7. On May 5, 1998, the Court entered an order on those issues, finding that the School District's May 13, 1997 individualized education program ("IEP") for Janice Doe provided an appropriate placement for her, requiring the School District to provide weekly tutoring as part of the IEP and reimburse Plaintiffs for certain extended school year costs that Plaintiffs had incurred. The May 5, 1998 order otherwise affirmed the administrative hearing and appeal officer decisions as to all other matters, including the appellate hearing officer's finding that prior to May 13, 1997, the School District offered a free appropriate public education to Janice Doe.

8. The actions taken by the School District in this case were based on the School District's good faith interpretation of its obligations under the IDEA, including Dr. Bonnie

Johnson's decision that the School District could provide Janice an education at its schools for the 1995-1996 year, or the March 16, 1993 settlement agreement entered into by the parties in this case.

9. Becky Standley is the Director and Owner of the Rivendale Institute of Learning, a private school for handicapped children located in Springfield, Missouri. Based on Ms. Standley's experience as a special education teacher, Ms. Standley asserts that Dr. Johnson's decision on May 25, 1995, to withdraw funding for Janice Doe's private school education constituted gross negligence or gross mismanagement because, in her opinion, Dr. Johnson's decision was premature absent a current evaluation by Janice's IEP team and also violated the "stay-put" provisions of the IDEA by failing to adhere to the last agreed-upon placement of Janice Doe.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer

evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

By order of the Court, the parties filed a joint statement of issues remaining before the Court in light of the Court's orders of August 8, 1996 and May 5, 1998. Plaintiffs continue to assert claims under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Americans With Disabilities Act, 42 U.S.C. §§ 12132-12133, as well as a claim of unlawful retaliation against Plaintiffs for their assertion of rights secured under those statutes. Plaintiffs further assert a claim based on 42 U.S.C. § 1983 for violations of the IDEA as well as infringement of procedural due process rights secured by the Fifth and Fourteenth Amendments of the Constitution. These claims have been fully briefed by the parties and the record, arguments, and authorities presented have been carefully considered by the Court. The Court will address each claim in turn.

A. Rehabilitation Act of 1973

Plaintiffs allege in Count II of their First Amended Complaint that the School District violated section 504 of the Rehabilitation Act of 1973. Section 504 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance[.]

29 U.S.C. § 794. The regulations which implement § 504 require a recipient of federal funds operating a public elementary or secondary education program to provide "a free appropriate education to each qualified handicapped person who is in the recipient's jurisdiction." 34 C.F.R. § 104.33(a). The regulations further provide that recipients can meet the requirement of providing a free appropriate public education through the "[i]mplementation of an individualized

education program developed in accordance with the Education of the Handicapped Act (the predecessor to the IDEA)[.]" See 34 C.F.R. § 104.33(b)(1), (2).

Assuming, for purposes of the instant motion, that this Court's May 5, 1998 order does not preclude Plaintiffs from asserting a claim under section 504, see, e.g., Independent Sch. Dist. No. 283 v. S.D., 1995 WL 875463 (D. Minn. 1995), aff'd, 88 F.3d 556 (8th Cir. 1996), the Court concludes that Plaintiffs have not set forth admissible evidence which would support a claim under § 504. Assuming that this Court's May 5, 1998 order could be construed as finding minor violations of the IDEA, federal courts have uniformly held that plaintiffs alleging violations of § 504 must allege and prove more than a mere violation of the IDEA, instead requiring plaintiffs to prove that the school district's actions were grossly negligent or misjudged or were undertaken in bad faith. See, e.g., Sellers v. School Board of the City of Manassas, 141 F.3d 524, 528-29 (4th Cir.), cert. denied, 119 S. Ct. 168 (1998); Timms v. Metropolitan Sch. Dist. of Wabash Co., 722 F.2d 1310, 1317-18 (7th Cir. 1983); Brantley v. Independent Sch. Dist. No. 625, 936 F. Supp. 649, 653 (D. Minn. 1996).

In support of their claim, Plaintiffs offer only the affidavit of Becky Standley, in which Ms. Standley states that Dr. Johnson's decision to terminate funding constitutes "gross negligence". The Court notes, however, that the facts upon which Ms. Standley's opinion is based relate solely to the alleged violations of the IDEA on the part of Dr. Johnson and the School District, which, as the Court previously noted, are insufficient to support a violation of § 504. Thus, the Court is left with Ms. Standley's bare allegation of gross negligence, which, standing alone, is insufficient to create a genuine issue of material fact. Finally, assuming that no showing of gross negligence or bad faith is required to award declaratory and injunctive relief as

well as attorney fees, see Jonathan G. v. Caddo Parish Sch. Bd., 875 F. Supp. 352, 365-66 (W.D. La. 1994), to receive such relief Plaintiffs must, at a minimum, establish "discrimination resulting from what may fairly be characterized as the official policy of the school board." See Jonathan G., 875 F. Supp. at 365. Plaintiffs have provided no factual basis to support such a finding in their responses to the School Board's summary judgment motion. Accordingly, the School District is entitled to summary judgment on Plaintiffs' Rehabilitation Act claim.

B. Americans with Disabilities Act

In Count II of their First Amended Complaint, Plaintiffs also allege violations of sections 12132 and 12133 of the Americans with Disabilities Act of 1990. Section 12132 provides in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. As with Plaintiffs' claim under section 504 of the Rehabilitation Act, the Court finds that something more than a violation of the IDEA must be shown to support a violation of the Americans with Disabilities Act in the education context. See, e.g., Pottgen v. Missouri State High School Activities Assoc., 40 F.3d 926 (8th Cir. 1994) (holding that the enforcement remedies, procedures, and rights under Title II of the ADA are coextensive with those provided by section 504 of the Rehabilitation Act); Brantley v. Independent Sch. Dist. No. 625, 936 F. Supp. 649, 656 (D. Minn. 1996) (holding that bad faith or gross misjudgment must be established in order to establish a violation of the ADA in the educational context). As the Court previously held with respect to Plaintiffs' § 504 claim, Plaintiffs have provided no factual

basis to support such a finding in their responses to the School District's summary judgment motion. Thus, the School District is entitled to summary judgment on Plaintiffs' ADA claim as well.

C. Retaliation

Plaintiffs further allege that the School Board retaliated against them because of their efforts to enforce the rights secured by § 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities in Education Act. The School District notes that no court has expressly stated the elements of a claim of retaliation in the education context, but argues that the elements of a claim of discriminatory retaliation in the employment context are analogous and should be applied in this case. See, e.g., Saladin v. Turner, 936 F. Supp. 1571 (N.D. Okla. 1996) (to establish a claim of retaliatory discrimination, a plaintiff must prove that she 1) engaged in protected conduct; 2) was the subject of adverse action; and 3) a causal link exists between the protected activity and the adverse action). Plaintiffs do not address this issue in their response, but instead argue that their retaliation claim is not ripe for consideration in the summary judgment context because no record has been developed and Plaintiffs have not had ample opportunity to conduct discovery on this issue. The Court notes, however, that Plaintiffs have made no request for additional time to respond or discover pursuant to Fed. R. Civ. P. 56(f), and that Plaintiffs were provided more than adequate time to develop the factual record with respect to this issue. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1553-55 (10th Cir. 1993); Weir v. The Anaconda Co., 773 F.2d 1073, 1083 (10th Cir. 1985). Accordingly, the Court concludes that this issue is ripe for consideration.

Assuming, for purposes of the instant motion, that the elements of a claim of retaliation in

the education context are analogous to those used in a retaliation claim in the employment context and should be applied in this case, the Court concludes that Plaintiffs have failed to present admissible evidence of discriminatory retaliation in their responses to the School Board's motion for summary judgment. Though Plaintiffs offer an unsigned affidavit over the name of Sally Doe to rebut the School Board's motion, such a document is insufficient to create a genuine issue of material fact, as this Court may not rely on an infirm affidavit for summary judgment purposes. See Fullick v. Breckenridge Ski Corp., 1992 WL 95421, at *3 (10th Cir. 1992). Moreover, even if Sally Doe's affidavit were sufficient as to form, the affidavit sets forth only conclusory statements regarding the School District's actions, not specific facts from which this Court could conclude a genuine issue of material fact exists. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995). Accordingly, on the factual record before this Court, the School District is entitled to summary judgment on Plaintiffs' retaliation claim.

D. 42 U.S.C. § 1983

Count II of Plaintiffs' First Amended Complaint alleges a cause of action pursuant to 42 U.S.C. § 1983, asserting that the School District violated rights guaranteed by the IDEA, the ADA, the Rehabilitation Act, and the Fifth and Fourteenth Amendments of the United States Constitution. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States shall be liable to the party injured in an action at law[.]

42 U.S.C. § 1983. As previously noted, Plaintiffs' claims of statutory violations of the ADA

and the Rehabilitation Act of 1973 cannot withstand summary judgment, and thus cannot support a cause of action under § 1983. Accordingly, Plaintiffs' remaining § 1983 claims relate to the School District's alleged violation of the IDEA and of rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The School District argues that Plaintiffs do not have valid claims under § 1983 for the constitutional and statutory violations alleged by Plaintiffs. The Court will address each of these matters in turn.

1. Constitutional Violation -- Procedural Due Process

As with Plaintiffs' other claims, Plaintiffs' constitutional claim is based solely on the School District's refusal to pay private school tuition for Janice Doe. Plaintiffs argue that the School District violated procedural due process by failing to provide notice and an opportunity to be heard prior to the School District's refusal to pay for Janice Doe's private school tuition. To properly invoke the protection of the Due Process Clauses, a plaintiff must allege a deprivation of a property or liberty interest. See Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). In their response to the School District's motion for summary judgment, Plaintiffs assert that "Janice Doe possesses an interest in the right and privilege of education in the form of attending the private school[.]" See Plaintiffs' Response to Defendant's Motion for Summary Judgment and Statement of Material Facts and Brief in Support Thereof, at 8.

Under controlling authority, Janice has no constitutional right to an education, and no constitutional right to any specific component of her education, such as the right to attend a particular school. See San Antonio Sch. Dist. v. Rodriguez, 411, U.S. 1, 35 (1973); Seamons v. Snow, 84 F.3d 1226, 1234-35 (10th Cir. 1996). Accordingly, Plaintiffs cannot state a claim for violation of procedural due process, as Plaintiffs have not alleged the deprivation of a liberty or

property interest protected by the Due Process Clauses, and thus cannot state a cause of action pursuant to 42 U.S.C. § 1983. Therefore, Defendant is entitled to summary judgment on Plaintiffs' constitutional claim.

2. Statutory Violation -- IDEA

Finally, Plaintiffs assert a § 1983 claim for the School District's alleged violations of the IDEA. Relying on Sellers v. School Board of the City of Manassas, 141 F.3d 524 (4th Cir. 1998), the School District argues that a § 1983 claim may never be premised upon a violation of the IDEA. Plaintiffs respond that this Court should instead adopt the view set forth in W.B. v. Matula, 67 F.3d 44 (3rd Cir. 1995) and Walker v. District of Columbia, 969 F. Supp. 794 (D.D.C. 1997), which held that in enacting 20 U.S.C. § 1415(f), Congress specifically intended that violations of the IDEA could be redressed through a claim under § 1983. Based upon a review of the applicable authorities, the Court finds that 20 U.S.C. § 1415(f) reflects a Congressional intent to allow a plaintiff to assert a § 1983 claim only for violations of the IDEA which cannot be addressed through the remedial mechanisms established by the statutory scheme of the IDEA.

Section 1415(f) provides as follows:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youths with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(f). The legislative history of this provision clearly demonstrates that Congress

intended section 1415(f) to legislatively overrule the Supreme Court's holding in Smith v. Robinson, 468 U.S. 992, 1012-13 (1984), which construed the IDEA (then known as the Education of the Handicapped Act, or "EHA") as the exclusive means by which parents and children may secure a free and appropriate public education. See, e.g., S. Rep. No. 99-112, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 1798, 1799; see also Board of Education v. Diamond, 808 F.2d 987, 994-95 (3d Cir. 1986). Moreover, the legislative history clearly reflects the understanding of both the House of Representatives and the Senate that actions brought pursuant to 42 U.S.C. § 1983 would be governed by the provisions of section 1415(f). See H.R. Conf. Rep. No. 99-687, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 1807, 1809. Thus, this Court rejects Sellers' construction of section 1415(f) as limiting the relief available to plaintiffs to include only those statutes specifically protecting disabled persons or children, see Sellers, 141 F.3d at 530, as that construction is inconsistent with the legislative history of that provision. Further, though the Sellers holding would not allow Plaintiffs to assert a § 1983 claim for violations of the IDEA, the Sellers court would permit Plaintiffs "to resort to section 1983 for constitutional violations, notwithstanding the similarity of such claims to those stated directly under the IDEA." Id. In light of the broad language of section 1415(f) and the broad construction Congress intended it to be given, this Court cannot conclude that Congress intended such an inconsistent result to obtain merely because § 1415(f) does not specifically incorporate a citation to 42 U.S.C. § 1983. Accordingly, this Court finds that in enacting § 1415(f), Congress intended to allow plaintiffs to assert § 1983 claims for violations of the IDEA under certain circumstances.

The Court notes, however, that "[s]ection 1983 [does] not provide a right to damages

where none existed before." Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 387 (6th Cir. 1992). In Crocker, the Sixth Circuit held that a plaintiff may not recover general damages under § 1983 for violations of rights secured by the IDEA. Relying on authorities construing 20 U.S.C. § 1415(e)(2), which provides a reviewing court the authority to "grant such relief as the Court deems appropriate," the Crocker court concluded that the damages provision of the IDEA does not encompass the authority to award general damages for emotional injury or dignitary injury. See Crocker, 980 F.2d at 386 (citing cases). Because § 1983 merely secures federal rights granted by statute, the scope of remedies available to a plaintiff are limited by the statutory scheme which grants the right. Thus, the remedies available under § 1983 for violations of the IDEA are coterminous with those available under the IDEA, and do not include monetary awards for emotional damages. See id. at 385-86.

This Court adopts the Sixth Circuit's holding in Crocker and concludes that Plaintiffs may not recover general damages under § 1983 for violations of rights secured by the IDEA, and that the remedies available under § 1983 for violations of the IDEA are coterminous with those available under the IDEA. Thus, Defendant is entitled to summary judgment on Plaintiffs' claims for monetary damages relating to emotional and mental distress as alleged in Count II of the First Amended Complaint. Moreover, assuming for purposes of this motion that the School District violated Plaintiffs' rights under the IDEA, this Court has brought to bear the full panoply of remedies available to Plaintiffs under the provisions of the IDEA, as evidenced by this Court's thorough consideration of Plaintiffs' IDEA claims through a series of proceedings culminating with its May 5, 1998 order granting relief. Under these circumstances, and recognizing the conterminous nature of the remedies available under the IDEA and § 1983 in this instance, the

Court concludes that further proceedings would be duplicative and unnecessary. Plaintiffs have received a full and fair hearing on their IDEA claims, and were provided all remedies this Court determined to be appropriate under the specific circumstances of this case.

Accordingly, for the reasons expressed herein, Defendant Independent School District No. 9 of Tulsa County, Oklahoma's Motion for Summary Judgment and Statement of Material Facts and Brief in Support filed July 23, 1998 (Docket # 58) is hereby granted. All other motions pending in this case and in related case number 97-cv-610 are hereby moot.

IT IS SO ORDERED.

This 31st day of March, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



CLARENCE E. BROTHERS,
443-50-3345

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-503-H (M)



**REPORT AND RECOMMENDATION**

Plaintiff, Clarence E. Brothers, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

[1] Plaintiff's November 16, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 12, 1996. By decision dated January 29, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 27, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff met the insured status requirement for Title II benefits through December 31, 1995. A previous application for benefits was denied January 19, 1994. The ALJ found that there was not good cause for opening the previous claim. Therefore, Plaintiff's onset date was amended to January 20, 1994. Since his insured status expired December 31, 1995, and since 42 U.S.C. § 423(d)(1)(A) provides that consideration of a claimants case may be undertaken only during the period when the claimant is insured for benefits, the time frame under consideration extends from January 20, 1994 to December 31, 1995.

Plaintiff was born January 6, 1951, and was 45 years old at the time of the administrative hearing. He has an 11th grade education and formerly worked as a heavy equipment operator, auto mechanic and oil field pumper. Plaintiff claims to be disabled due to residuals from back injury and surgery, and a depressive disorder. The ALJ determined that although Plaintiff was unable to lift and carry more than 20 pounds occasionally or more than ten pounds on a regular basis, he is capable of

performing the walking, standing, sitting, pushing and pulling demands necessary for light work. The ALJ found it would be difficult for Plaintiff to perform more than occasional stooping, crawling, bending, crouching, kneeling, climbing and balancing, and he should not climb in unprotected heights or perform tasks requiring overhead reaching, or perform tasks requiring vibration. Since Plaintiff is blind in the right eye, he could not perform a job requiring binocular vision or good depth perception. Based on the testimony of a vocational expert, the ALJ found that Plaintiff's past work as an oil field pumper, as generally performed in the national economy, was not precluded by his impairments. Since Plaintiff was capable of performing his past relevant work, the ALJ found Plaintiff was not disabled. [R. 19-20]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to conduct an appropriate pain and credibility analysis; (2) failed to pose an appropriate hypothetical to the vocational expert; and (3) relied on vocational expert testimony which is contradicted by the Dictionary of Occupational Titles.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801

F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Although the ALJ did not specifically cite *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987), the ALJ applied the evidence to the guidelines set out in that case. [R. 17]. Plaintiff testified that his pain was always present at a mild level, but sometimes worse [R. 324], that he uses a shower massage for relief of pain [R. 325], does not take pain medication [R. 326], and was unable to identify any activities that would cause mild pain to get worse [R. 325]. He described daily activities, including taking daily care of two horses, which are not consistent with disabling pain. [R. 341]. The Court finds that the ALJ sufficiently set forth reasons, supported by evidence in the record, for his pain and credibility determination.

Plaintiff claims that the hypothetical question posed to the vocational expert was incomplete in that it failed to include all of his limitations. *Hargis v. Sullivan,* 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ accounted for the limitations demonstrated by the record in his determination of Plaintiff's residual functional capacity and in his hypothetical questioning of the vocational expert. [R. 18, 349]. The court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the

vocational expert's testimony in his decision were proper and in accordance with established legal standards.

Plaintiff also argues that the ALJ erred in relying on the vocational expert's testimony that Plaintiff could return to his past relevant work as an oil field pumper because the Dictionary of Occupational Titles ("DOT") reflects that the job requires more frequent climbing and balancing than the ALJ's hypothetical and greater visual demands than Plaintiff's capability. Plaintiff failed to provide any citation to authority or analysis demonstrating why a discrepancy between the DOT and vocational expert's testimony requires reversal.

The court notes that other Circuit Courts have addressed the effect of a direct contradiction between vocational expert testimony and the DOT, but the Tenth Circuit has not done so in a published opinion.

Although 20 C.F.R. § 404.1566(d) provides that the Commissioner will take administrative notice of reliable job information available from various governmental and other publications, including the DOT, nothing in that section requires the Commissioner to accept the DOT as a greater source of authority than other publications or vocational expert testimony or to explain any deviation from the DOT. Furthermore, commentary and instructional information accompanying the DOT clearly establishes that DOT does not purport to be a definitive authority. The "Special Notice" found at DOT, Vol. I, p. *xii*, states:

> Occupational information contained in the revised fourth edition DOT reflects jobs as they have been found to occur, but they may not coincide in every respect with the content

> of jobs as performed in particular establishments or at certain localities. DOT users demanding specific job requirements should supplement this data with local information detailing jobs within their community.

The Introduction to the DOT explains that changes in occupational content and job characteristics due to technological advancement continue to occur at a rapid pace requiring study of selected industries to document the jobs that have undergone significant occupational change. The 1991 fourth edition supplement of the DOT has been the result of this ongoing change and study. The 1991 revision is "presented in the hope that it will provide the best 'snapshot' of how jobs continue to be performed in the majority of industries across the country." *Id.* at *xvi*.

Since the regulations providing for administrative notice of the DOT do not require the ALJ's reliance on the DOT when a vocational expert disagrees with the DOT; since the DOT recognizes that there will be variances between its descriptions and the performance of jobs in the national economy; and since it alerts the reader that technological advances are rapidly occurring and changing the way work is performed; this court finds that the DOT does not always control when contradicted by the testimony of a vocational expert. Nor does such a contradiction demand an explanation by the vocational expert before the ALJ may rely on the vocational expert's testimony.

In the present case, the vocational expert testified that an individual with the specified hypothetical limitations could perform the job as an oil field pumper. [R. 350]. The vocational expert also testified that assuming the claimant's testimony was

fully credible, he could return to the oil well pumping job. [R. 356-57]. Nothing obligates the ALJ to search the DOT to determine whether the vocational expert's testimony is consistent with it. And, nothing in the record suggests that any discrepancy exists. Absent any clear regulation, or a published Tenth Circuit opinion to the contrary, the court finds that the ALJ was entitled to credit the vocational expert's testimony, irrespective of information contained in the DOT. The court finds no error as a result of the ALJ's reliance on the vocational expert's testimony. The ALJ's finding that Plaintiff could return to his former work as an oil field pumper is supported by substantial evidence.

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Commissioner finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 31st Day of March, 1999.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of April, 1999.

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

JUDY A. DANIELS,
440-58-0494

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE APR - 1 1999

Case No. 98-CV-123-M

FILED

MAR 31 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**JUDGMENT**

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this 31 day of March, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

17

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



JUDY A. DANIELS,
440-58-0494

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-123-M



**ORDER**

Plaintiff, Judy A. Daniels, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,

[1] Plaintiff's October 31, 1995, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 8, 1996. By decision dated November 21, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 12, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 27, 1954, and was 42 years old at the time of the hearing. She has a 12 grade education and formerly worked as a grocery checker. She claims to have been unable to work since April 28, 1994, as a result of back injury and carpal tunnel syndrome. The ALJ determined that although Plaintiff is not capable of performing her past relevant work, she has the residual functional capacity to perform a wide range of light work subject to: no repetitive pushing or pulling of arm or leg controls; no climbing ladders, ropes or scaffolds; no repetitive overhead reaching; no repetitive extreme rotation or flexion and extension of the neck; and a mild to moderate limitation on the ability to grip bilaterally and perform repetitive hand motion. [Dkt. 14]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

On appeal to this court, Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) made erroneous findings concerning her residual functional capacity; (2) performed an erroneous credibility analysis; and (3) failed to include all of Plaintiff's limitations in the hypothetical question asked of the vocational expert. The Commissioner asserts that, pursuant to the Tenth Circuit's holding in *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996), Plaintiff waived these errors because they were not raised by her previous attorney at the administrative level to the Appeals Council.[2] In reply, Plaintiff argues, not that the issues were raised, but that the *James* waiver rule should not apply because the Commissioner failed to raise waiver as an affirmative defense in his Answer.

In *James* the Tenth Circuit announced a new rule applicable to Social Security disability appeals: "Issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." *Id.* at 1344. The Court stressed the importance of specifically identifying the issues, finding that a summary request for review which did not address the ALJ's decision at all, but merely stated in conclusory terms, "I am disabled and entitled to benefits," was inadequate to apprise the Appeals Council of the particularized points of error subsequently argued in the courts. *Id.* at 1343. In addition, the Court stated that a request for review which does not identify the issues

[2] Plaintiff is represented by different counsel on appeal to this court.

with any particularity effectively sandbags the Appeals Council, thus depriving the Court of the Appeals Council's views on the issues and unnecessarily causing delay in the Claimant's possible receipt of benefits. *Id.* at 1344.

The ALJ's decision advised Plaintiff of her rights on appeal, stating:

> 1. Any issue upon which you appeal must be specifically stated, so as to adequately apprise the Appeals Council of the particular points of error alleged to be made by the United Stated Administrative Law Judge in the Decision.
>
> 2. It is insufficient to simply state "**I am disabled and entitled to benefits**" or similar conclusory language when appealing. Such language has been held to be inadequate in apprising the Appeals Council of error (s) by the United Stated Administrative Law Judge.
>
> 3. Failure to state with particularity the issues raised to the Appeals Council on appeal will result in waiver of those issues should judicial review later be sought before the United States Courts.
>
> 4. Issues not stated with particularity to the Appeals Council will not be able to be raised for the first time before the United States Courts.
>
> **See, James v. Chater**, Case No. 95-2231 (10th Cir. 1996).

[R. 17]. [emphasis in original]. Thus, the ALJ clearly and unambiguously advised Plaintiff of the necessity of identifying contested issues to the Appeals Council with particularity, and of the consequences of failing to do so.

On appeal to the Appeals Council, Plaintiff asserted the following:

> The Administrative Law Judge was obviously in error and found unfavorably against the clear weight of the evidence. The evidence showed that claimant's hands are numb and she cannot hold things. She also testified she is in severe pain and can only sit for 15 minutes and walk 15 to 30

> minutes. She claims she is in constant pain. She also had bond [sic] spurs in the neck which was omitted from the Administrative Law Judge's decision. Other complaints were also omitted from the decision.
>
> The Administrative Law Judge based his decision upon the medical records solely and refused to consider the testimony of the claimant. This Judge is obviously prejudice [sic] and gives no weight to the testimony of any claimant. Considering the severity of her problems, this claimant should have received her disability income to which she is entitled. Apparently this Administrative Law Judge does not believe any claimant should receive Social Security/Disability benefits. It should be noted that the vocational person testified that claimant could not work at any job described by the Social Security Act. Once again, the Administrative Law Judge gave this no weight.

[R. 7].

The Court rejects Plaintiff's assertion that the Commissioner waived application of the *James* waiver rule by failing to assert it in his Answer to Plaintiff's Complaint. Fed. R. Civ. P. 8(c) lists waiver as a defense that must be affirmatively plead in a responsive pleading. Generally, failure to raise an affirmative defense in an answer will result in waiver of the defense. ***Bentley v. Cleveland County Bd of County Commrs.***, 41 F.3d 600, 604 (10th Cir. 1994). However, that general rule is not without exception. If the defense is raised at "a pragmatically sufficient time," and the party opposing the defense was not prejudiced in its ability to respond, a court may hold that the defense was not waived. ***United States v. Shanbaum***, 10 F.3d 305, 312 (5th Cir. 1994) (quoting *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986)); *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440 (10th Cir. 1992)(defense not waived by failure

to plead in answer since plaintiff had notice of defense at least 3 months before trial); *Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1409 (10th Cir. 1988) (same).

In keeping with notice pleading permitted by the Federal Rules of Civil Procedure, Plaintiff's complaint contains only general allegations of error. Since the complaint did not apprise Defendant of Plaintiff's specific allegations of error, Defendant had no basis upon which to assert the *James* waiver. The court finds that the Commissioner asserted the *James* waiver at a "pragmatically sufficient time," and in fact, the earliest practicable time. (i.e. in response to Plaintiff's appeal brief which identified her specific allegations of error for the first time). Further, in view of the fact the ALJ provided Plaintiff unambiguous notice of the applicability of *James* to her case, she has not been surprised or otherwise prejudiced in her ability to prosecute this appeal. The Commissioner did not waive the applicability of *James* by failing to plead it in answer to Plaintiff's complaint.

The court concludes that Plaintiff was given sufficient notice of the *James* waiver rule and that rule is applicable to this case. The issues on appeal are therefore limited to those Plaintiff raised with particularity to the Appeals Council. Reviewing Plaintiff's letter to the Appeals Council and comparing it to the issues Plaintiff raises before this court, the court finds that the ALJ's evaluation of Plaintiff's credibility is the only issue raised to the Appeals Council with sufficient particularity to preserve the issue for appeal. In addition, the court finds nothing within the record to support Plaintiff's assertion that the Appeals Council failed in its duty to conduct a proper review.

The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 96-7p and appropriately applied the evidence to those guidelines. In his credibility assessment, the ALJ relied upon the objective evidence of Plaintiff's grip strength, range of motion and reflex testing, objective testing that showed an absence of an objective basis for Plaintiff's complaints of disabling pain, and the opinion of Plaintiff's physicians concerning her ability to work. The court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts and that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 31ST day of March, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

RICHARD ALVIN CARROLL
aka Richard Carroll aka Richard A. Carroll
aka Ricky Carroll, a single person;
STATE OF OKLAHOMA ex rel.
Department of Human Services;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.



CIVIL ACTION NO. 98-CV-0563-B (J)

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 30th day of March, 1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Department of Human Services, appears not, having previously filed its disclaimer; and the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, executed a Waiver Of Service Of Summons through his attorney

9

Joel L. Kruger on August 28, 1998; that the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, was also served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on December 11, 1998; and that the Defendant, State of Oklahoma ex rel. Department of Human Services, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on December 3, 1998.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 12, 1998; that the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Disclaimer on February 2, 1999; and that the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Eighteen (18), Block Seven (7), WOODLAND GLEN FOURTH, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on August 31, 1990, Richard Alvin Carroll executed and delivered to BancOklahoma Mortgage Corp. his mortgage note in the amount of $56,900.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Richard Alvin Carroll and Terri Linn Carroll, husband and wife, executed and delivered to BancOklahoma Mortgage Corp. a real estate mortgage dated August 31, 1990, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 5, 1990, in Book 5274, Page 2251, in the records of Tulsa County, Oklahoma.

The Court further finds that Terri Carroll and Richard Carroll were divorced by Decree of Divorce filed October 7, 1992, Case No. FD-92-00374, District Court, Tulsa County, State of Oklahoma.

The Court further finds that on March 1, 1993, Terri L. Carroll, a single person, executed a Quit-Claim Deed conveying all her interest in the subject real property to Richard A. Carroll, a single person. This Quit-Claim Deed was recorded on March 9, 1993, in Book 5482, Page 1797 in the records of Tulsa County, Oklahoma.

The Court further finds that on July 8, 1996, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Corporation Assignment of Mortgage/Deed of Trust was recorded on July 25, 1996, in Book 5830, Page 1456, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on August 1, 1996 was made principal and the interest rate changed to 5 percent per annum.

The Court further finds that the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, is indebted to the Plaintiff in the principal sum of $49,067.60, plus administrative charges in the amount of $540.00, plus penalty charges in the amount of $161.52, plus accrued interest in the amount of $1,449.42 as of April 2, 1997, plus interest accruing thereafter at the rate of 5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, State of Oklahoma ex rel. Department of Human Services, disclaims any right, title or interest in subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover in rem judgment against the Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, in the principal sum of $49,067.60, plus administrative charges in the amount of $540.00, plus penalty charges in the amount of $161.52, plus accrued interest in the amount of $1,449.42 as of April 2, 1997, plus

interest accruing thereafter at the rate of 5 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.918 percent per annum until paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person; State of Oklahoma ex rel. Department of Human Services; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, Richard Alvin Carroll aka Richard Carroll aka Richard A. Carroll aka Ricky Carroll, a single person, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> Second:
> In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

**PHIL PINNELL, OBA #7169**
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

**DICK A. BLAKELEY, OBA #852**
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 98-CV-0563-B (J) (Carroll)

PP:css